(21,185.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1909.

## No. 165.

WILLIAM T. FAY AND ELIZA T. FAY, HIS WIFE, PLAINTIFFS IN ERROR,

*vs.*

SAMUEL A. CROZER, JOHN P. CROZER, AND MARY CROZER PAGE, TRUSTEES OF THE CROZER LAND ASSOCIATION, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1909.

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1 TRANSCRIPT OF RECORD.

Circuit Court of the United States, Southern District of West Virginia, at Charleston.

WM. FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER and Others.

In Ejectment.

Price, Smith, Spilman & Clay for plaintiffs and plaintiffs in error; Brown, Jackson & Knight, and Rucker, Anderson, Strother & Hughes for defendants and defendants in error.

Be it remembered, that, heretofore, to-wit: On the first day of April, A. D. 1901, there was filed in the office of the Clerk of the Circuit Court of the United States for the District of West Virginia, at Charleston, Declaration and Notice in Ejectment, which, together with the Return of Service and Acceptance of Service endorsed thereon are in the words and figures as follows:

*Declaration and Notice in Ejectment.*

In the Circuit Court of the United States for the District of West Virginia, Sitting at Charleston, in said District.

William Fay and Eliza T. Fay, his wife, citizens of the State of Michigan, complain of Samuel A. Crozer and —— ——,
2 Trustees of the Crozer Land Association, all citizens of the State of Pennsylvania, Greenbrier Coal & Coke Company, a corporation; McDowell Coal & Coke Company, a corporation; Arlington Coal & Coke Company, a corporation; Houston Coal & Coke Company, a corporation; Turkey Gap Coal & Coke Company, a corporation; Norfolk Coal & Coke Company, a corporation; and Powhatan Coal & Coke Company, a corporation; all of said defendant corporations being chartered and organized and doing business under the laws of the State of West Virginia, and citizens of the said State of West Virginia, of a plea of trespass and ejectment, for that on the 1st day of January, 1895, they, the said William Fay and Eliza T. Fay, the said plaintiffs, were seized and possessed of an estate in fee simple of one undivided one-half of a tract of land containing 1200 acres, situate in the County of McDowell, in the state and District of West Virginia aforesaid, on Claybornes Ridge, a spur of the Flat Top Mountain, and on the end of Ferguson's Ridge, and on other spurs, hollows and branches, waters of the North Fork of Elkhorn Creek of Tug River, adjoining a 350 acre survey, in the name of William L. Graham and Robert C. Graham, and bounded as follows, to-wit: Beginning at three beeches, lynn, two birches and

poplar on the bank of the Turkey Gap Fork of Elkhorn, a corner to said 350 acres; thence with four lines thereof, N. 61 W., 175 poles to two poplars, two cucumbers and white walnut on the top of the Claiborne Ridge, at the junction of John's Knob Ridge, the beginning corner of said 350 acres; thence continuing with the said survey, S. 61½ W. 40 poles, along the top of said ridge to three chestnut oaks on top of the same; thence S. 89 W. 144 poles, crossing John's Knob Branch and crossing hollows and spurs to a chestnut, sourwood
*8 in others
and wawhoo on the point of a Spur; thence S. 63¾ W. 120 poles to a station in said line; thence leaving said survey, N. 35 W. 340 poles to a stake; thence N. 65 E. 470 poles to a stake; thence
S. 40 E. 310 poles to a stake; thence S. 5 E. 300 poles to the
3 beginning.

And the said plaintiffs being so possessed thereof, the said defendants to-wit: on the 2nd day of January, 1895, entered into and upon the said tract of land and premises, and unlawfully withhold from the said plaintiffs the possession thereof, to the damage of the said plaintiffs of $300,000.00, and therefore they bring their suit.

FLOURNOY, PRICE & SMITH,
Per Q.

To the above named defendants:

Notice is hereby given you and each of you that the foregoing declaration against you will be filed in the Clerk's office of the Circuit Court of the United States in and for the District of West Virginia, sitting at Charleston in said District, at Rules to be held in the said Clerk's office on the first Monday in April, 1901, and that if you or either of you fail to appear and plead to said declaration within the time required by law, judgment will be entered against you.

Dated this 26th day of February, 1901.

FLOURNOY, PRICE & SMITH,
*Attorneys for Plaintiffs.*

(Endorsed:) William Fay & Wife vs. Samuel A. Crozer et al. Declaration and Notice in Ejectment. Received Mar. 14, 1901. A. G. Hufford, Dep. U. S. Marshal. Circuit Court U. S. Dist. W. Va. Filed in Office this April 1, 1901. L. B. Dellicker, Clerk.

*Marshal's Return.*

Executed this writ by delivering a true office copy of the within Declaration and Notice to the within named —— Collins, Att'y in
fact for Greenbrier Coal & C. Co. C. E. Rusmisell, Att'y
4 in fact for McDowell Coal & Co. Co., James Elwood Jones,
Att'y in fact for Norfolk Coal & Co. Co., E. J. McQuail, Att'y in fact for Turkey Gap Coal & Coke Co., L. E. Tierney, att'y in fact for Powhatan Coal & Coke Co., R. H. Palmer, att'y in fact for Arlington Coal & Coke Company, this the 22nd day of March, 1901,

in McDowell County, West Va., in which county all said persons reside.

JNO. R. THOMPSON,
*U. S. Marshal,*
By A. C. HUFFORD, *Deputy.*

William Fay and wife vs. Samuel A. Crozer et al. Declaration. Service of the within accepted for Houston C. & Co. Co. and Trustees of Crozer Land Association this 13th day of March, 1901. Rucker & Keller, Counsel. Circuit Court U. S. Dist. W. Va. Filed in Office this April 1, 1901. L. B. Dellicker, Clerk.

And at another day, to-wit, on the 17th day of June, A. D. 1902, In Vacation, there was entered of record the following order:

*Order.*

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL CROZER et als.

In Ejectment.

On motion of plaintiff it is ordered that W. R. Graham, surveyor, do go upon the land in controversy and do such surveying as either party may require, and said surveyor shall return to this Court five reports and nine plats of such surveying as he shall do under this order. And before beginning to act under this order said surveyor shall give to the parties or their attorneys at least fifteen days' notice of the time and place of his commencing such surveying.

And at another day, to-wit, at a Circuit Court of the United States for the Southern District of West Virginia, continued and held at Charleston in said District on Wednesday, the 22nd day of November, A. D. 1905, the following order was made and entered of record.

*Order.*

WILLIAM FAY et ux.
vs.
SAMUEL A. CROZIER et al.

In Ejectment.

It appearing to the Court that the order of survey which was entered in this case on the 17th day of June, 1902, has not been executed, on motion of the plaintiffs, it is ordered that W. R. Graham, the surveyor named in said order, shall proceed with diligence to execute said order before the next term of this Court, and to return his reports and plats as required by said order to this Court before the beginning of the next term at Charleston.

It is further ordered that this case be and it is hereby set down for trial on the 7th day of the next term of this Court, and both parties are required to be prepared for the trial at that time.

And at another day, to-wit, on the 25th day of October, A. D. 1906, there was filed in the Clerk's office of said Court the surveyor's Report, which is in the words and figures as follows:

*Surveyor's Report.*

In the Circuit Court of the United States for the Southern District of West Virginia.

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER et als.

In Ejectment.

6 To the Honorable Judge of the Circuit Court of the United States for the Southern District of West Virginia.

At a sitting of said Court continued and held at Charleston, in said District, on Thursday, the 19th day of June, 1902, I was appointed by your Honor as surveyor in the above styled ejectment suit for the purpose of going upon the land in controversy and do such surveying as either party may require, and before beginning to act under said order, I should give to the parties or their attorneys at least fifteen days' notice of the time and place of commencing such surveying.

In obedience to said order, I did on the 24th day of July, 1905, give to the attorneys of record for both the plaintiffs and defendants written notice, by mailing the said attorneys a copy of the following notice:

"In the Circuit Court of the United States for the Southern District of West Virginia.

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER et als.

In Ejectment.

To Messrs. Price, Smith & Spilman, for plaintiffs, and Strother, Taylor and Strother, for defendants:

Take notice that for the purpose of executing the order of survey, entered on the 19th day of June, 1902 by the United States Circuit Court for the Southern District of West Virginia, in the above entitled cause, I will be at the Tug River Hotel, Welch, West Virginia, from 9 o'clock a. m. to 12 o'clock m. on Tuesday, the 15th day of August, 1905, to begin the surveying directed by said order,

and from thence will proceed to do such surveying as either of the parties to this action may require of me."

Very respectfully,

W. R. GRAHAM, *Surveyor.*"

Welch, W. Va., July 24, 1905.

On the 15th day of August, 1905, I was at the Tug River Hotel, Welch, West Virginia, as appointed by said notice, but there being no directions as to the surveying that would be required, I adjourned the time for commencing the execution of this order to an indefinite time.

7 Again on the 3rd day of April, 1906, I mailed to the said attorneys for both the plaintiffs and defendants, a written notice, that I would, on the 24th day of April, 1906, be at the office of the Crozer Coal & Coke Company, Elkhorn, West Virginia, for the purpose of commencing the execution of the order of survey in this suit.

Pursuant to said notice, I was at the office of said Company on the 24th day of April, 1906, having received written instructions from the plaintiffs' attorneys as to what surveying would be required in their behalf, which was to locate the lines of the entire survey of the Fay-Austin 1200 acres, and there being no one to show me any of the corners of said survey, I did on the afternoon of the 24th day of April, 1906, make a search and located the beginning corner of said 1200 acres in accordance with the description given in patent.

The land in controversy is a 1200 acre survey for which a patent was granted by the Commonwealth of Virginia, on the 3rd day of January, 1860, to Eliza T. Fay and Samuel W. Austin, and is described in said patent as follows, to-wit:

"Know Ye, that in conformity with a survey made on the seventeenth day of June, 1858, by virtue of Land Office Treasury Warrant, No. 25,042, there is granted by the said Commonwealth unto Eliza T. Fay and Samuel W. Austin, a certain tract or parcel of land, containing 1200 acres, lying in Tazewell county (now McDowell County, West Virginia,) on Claibourne ridge, a spur of Flat Top Mountain and on the end of Furguson's Ridge and on the spurs, hollows and branches waters of the North Fork of Elkhorn Creek of Tug River, adjoining a 350 acre survey in the name of William L. Graham and Robert C. Graham and Bounded as follows; viz: Beginning at three beeches, lynn, two birches and poplar on the bank of the Turkey Gap Fork of Elkhorn, a corner to said 350 acres; thence with four lines thereof N 61 W 175 poles to two poplars, two cucumbers and white walnut on top of the Claiborne Ridge at the junction of Johns Knob Ridge, the beginning corner of said 350 acres, thence continuing with said survey S 61½° W 40 poles along the top of said ridge to three chestnut oaks on top of the same, thence S 89 deg. W. 144 poles, crossing Johns Knob Branch and hollows and spurs to a chestnut, sourwood and wahoo on the point of a spur; thence S 68¾ deg. W 120 poles to a station in said line, thence leaving said survey N 35 deg. W 340 poles to a stake, thence N 65 deg. E 470 poles to a stake; thence S 40 deg. E 310 poles to a stake; thence S 5 deg. E 300 poles to the beginning."

On the 25th day of April, 1906, the following persons being
8 present, to-wit: S. H. Meen, Transitman, Robert Haskins and R. C. Ambler, Chainmen and axmen, and myself as the Court's surveyor, we commenced said survey at "three beeches, lynn, two birches and poplar on the bank of the Turkey Fork of Elkhorn, a corner to said 350 acres, there being two birches and two beeches standing "at the mouth of a hollow that runs down from the Turkey Gap Ridge from the second gap from its junction," as described in the said 350 acre survey. We ran from this point, (Marked "A" on accompanying map) N 63 deg. 58′ W. 2875.8 feet (174.3 poles) to two cucumbers on top of Claiborne Ridge, at the junction of John's Knob Ridge, (two poplars and white walnut called for, gone) point marked "B" on map.

The second call of said survey is "continuing with said survey (Graham 350 acres) S. 61½° W. 40 poles, along the top of said ridge to three chestnut oaks on top of same." In the description of the said 350 acre survey, the call is "N. 61½ deg. W." From letter "B" we ran N. 57 deg. 47′ W. 677.3 feet (41 poles) to two chestnut oaks on top of said ridge, marked "C" on map.

The third call of said survey is "S. 89 deg. W. 144 poles crossing John's Knob Branch and hollows and spurs to a chestnut sourwood and wahoo on the point of a "Spur." From letter "C" we ran S. 89 deg. 17′ W. 2322.7 feet (140.7 poles) with an old marked line, crossing John's Knob Branch and tributaries of same to a poplar and a down sourwood, on the point of a spur, marked "D" on map.

The fourth call of said survey is "thence S. 68¾ deg. W. 120 poles to a station in said line" (Graham 350 acres). From letter "D" we ran S. 64 deg. 34′ W. 1997.4 feet (121 poles) to a stake near the top of Buzzard West spur, marked "E" on map. We marked at this point a small cucumber pointer.

The fifth call is "thence leaving said survey N. 35 W. 340 poles to a stake." From letter "E," we ran N. 33 deg. W. (2 deg. var)
9 5610 feet (340 poles) crossing John's Knob and Rooting Camp Branches to a stake on a hillside about 200 feet of the latter branch, marked a small hickory pointer; letter "F" on map.

The sixth call is "N. 65 deg. E. 470 poles to a stake" (From letter "F" we ran) N. 67 deg. E. 7755 feet (470 poles) crossing the dividing ridge between the north and south forks of Elkhorn Creek, to a stake in a small hollow, marked a small black gum and hickory pointers at letter "G" on accompanying map.

The seventh call is "S. 40 deg. E. 310 poles to a stake." From letter "G" we ran S. 38 deg. E. 5115 feet (310 poles) crossing the north fork of Elkhorn Creek and the McDowell Ridge to a stake in the center of Greenbrier Creek about 200 feet above Adam, corner marked "H" on map.

The eighth call is "thence S. 5 deg. E. 300 poles to the beginning." From letter "H" we ran S. 0° deg. 33′ E. 4445.9 feet (269.4 poles) to letter "A," the beginning containing by re-survey 1202.6 acres.

There being no further instructions as to additional surveying for

the plaintiffs. I was directed by the defendants to locate, with reference to the Fay-Austin 1200 acre survey, the division line between the Wilson Cary Nicholas 500,000 acre survey and the Pickett 40,000 acre survey, also to locate such portions of the following tracts of land as should be found to lie within the boundary of the Fay-Austin 1200 acre patent, to-wit: Straley, French and Welch 1281 acre tract, the William Belcher 113 acre tract and the J. W. Harman 46 acre tract. In order to identify the three last surveys referred to I will add that in the sales made by H. C. Auvil, Commissioner of School Lands for McDoweli County, reported by him on March 20,
10 1883, the said Commissioner reports 34 tracts of land sold, aggregating 5,018 acres. Among the tracts sold are the following: 600 acres, on South Fork of Elkhorn, to C. W. Straley, H. W. Straley, W. A. French and I. A. Welch, 100 acres, on Rooting Camp Branch of South Fork of Elkhorn, to William Belcher and 46 acres, on John's Knob Branch of Elkhorn, to J. W. Harman. By subsequent surveys, it has been ascertained that the two first named surveys contained 1281 acres and 113 acres, respectively.

Accordingly on the 16th day of May, 1906, there being present E. H. Evans, for the defendants, W. H. Henderson, Transitman, John C. Knuckles, and Alex Williams, chairmen, G. T. Mitcham, axeman and myself as the Court's Surveyor. We commenced at two chestnuts and a gum stump, on the north side of Claiborne Ridge opposite the head of Rooting Camp Branch, a corner of the Straley-French-Welch 1281 acre tract, also a corner of the William Belcher 113 acre tract; point marked "I" on accompanying map, and in accordance with the descriptions of the said surveys, we ran from said corner S. 25 deg. 56′ W. 1089.4 feet, crossing the divisions line between the said Nicholas and Pickett surveys at 15 feet to a down chestnut oak on top of Claiborne Ridge; letter "J" on map.

From letter "J" we ran S. 84 deg. 33′ W. 301.9 feet to a chestnut oak, chestnut and forked locust on the end of a spur; letter "K" on accompanying map.

From letter "K," we ran S. 63 deg. 45′ W. 474.8 feet to three chestnuts (2 down); letter "L" on map.

From letter "L" we ran S. 75 deg. 58′ W. 423.5 feet to a chestnut oak and shall chestnut on the side of a spur; letter "M" on accompanying map.

From letter "M," we ran N. 28 deg. 15′ W. 410 feet to a point of intersection with line of Fay-Austin 1200 acre survey, running from letter "F" to "G," intersection at letter "N" on map.

11 That portion of the division line between the Nicholas and Pickett surveys, as shown on accompanying map, is also a line of the Straley-French-Welch 1281 acre tract, said 1281 acres lies wholely on the west side of said Nicholas-Pickett, sometimes called the Maitland-Davis line.

The J. W. Harman 46 acre tract is approximately shown on accompanying map by letters D-Q-R-D.

In regard to the divisions line between the Wilson Cary Nicholas 500,000 acre survey and the Pickett 40,000 acre survey; the original survey of the first-mentioned tract was made on the 9th day of September, 1794. In the said survey, the line in question calls for run-

ning from 'four white oaks S. 27 E. 3840 poles crossing some of the head branches of Elkhorn Creek and the ridge that divides the waters of Tug and Bluestone River and crossing the latter twice to a hickory and white oak on the bank of the same at the mouth of Laurel Creek." This line within the last fifteen years has been re-surveyed and well marked and I have not been advised of any question in connection with the accuracy of the location of said line. We retraced this line from the point of intersection of same with line of Fay-Austin 1200 acre survey (letter "S" on map) on the bearing of S. 29 deg. E.; following a well marked line to the intersection of same with another line of said Far-Austin 1200 acres, at point marked "T" on map. The Wilson Cary Nicholas 500,000 acre survey lies in the east side and the Pickett 40,000 acre survey lies on the west side of the line shown on accompanying map.

At the request of the defendants I have also shown on the accompanying map, by protraction, such portions of the Houston Coal & Coke Company and Turkey Gap Coal & Coke Company's coal leases as are included within the boundary of the Fay-Austin 1200 acre survey.

I will add, that in making this report, I have left out all details of offsets, connecting lines, etc., and report only direct ascer-
12 tained courses and distances from corner to corner or point to point and in the natural order in which they should stand.

All of which is respectfully submitted.

W. R. GRAHAM,
*Surveyor for the Court.*

Pocahontas, Va., Oct. 20, 1906.

(Here follows map marked p. 12*a*.)

(Endorsed:) Wm. Fay et ux. v. Crozier et al. In Ejectment. Surveyor's report. Circuit Court U. S. So. Dis. W. Va. Filed in office this 25th day of October 1906. Edwin M. Keatley, Clerk.

And at another day, to-wit at a circuit court of the United States for the Southern District of West Virginia, continued and held at Charleston in said district, on Tuesday the 13th day of November, A. D. 1906, the following order was made and entered of record:

*Order.*

**No. 155.**

ELIZA T. FAY and WILLIAM FAY, Plaintiffs,
vs.
S. A. CROZER et al., Defendants.

In Ejectment.

This day came the plaintiffs by their attorneys, and also came the defendants, Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, the Houston Coal & Coke Company, and the Turkey Gap Coal & Coke Company, by their attorneys, and the said named defendants for plea in this behalf say that they are not guilty of unlawfully withholding the premises claimed by the plaintiffs in the declaration in this cause
13 named, and of this they put themselves upon the country, and the plaintiffs do the like, and issue is thereon joined, and thereupon the said plaintiffs and the above named defendants presented to the Court a stipulation in writing, marked Exhibit A and the exhibits therewith filed, which are ordered to be filed and made part of the record in this case, and it appearing from said stipulation that it is agreed between the parties to said stipulation that this action shall be tried at the present term, only as to the parties to said stipulation and only as to the undivided half interest claimed by the plaintiffs in a certain portion of the land described in the declaration, which portion is fully described in said stipulation, as follows: "That part of the tract of land in controversy which is shown on the map of surveyor W. R. Graham, filed in this action, by the following lines and letters, beginning at T; thence to D; thence to E, thence to F; thence to S; thence to T," being those portions of said 1200 acres lying south-west of the land between the Wilson Cary Nicholas 500,000 acre survey and the Pickett survey of 40,000 acres, and included in the leaseholds of the Houston Coal & Coke Company and the Turkey Gap Coal & Coke Company, as shown on the map filed in this case, and the said plaintiffs and the above named defendants, having by said stipulation agreed that this action as to said parties and the portion of the land aforesaid is to be submitted to and tried by the Court, a jury being waived and with a like effect as if tried by a jury and verdict rendered upon an instruction by the Court to find for the plaintiffs or defendants as the case may be, with all the rights of appeal or to a writ of error in all respects preserved to the losing

party and it further appearing from said stipulation that the said parties thereto have agreed — the facts, which are fully set forth in said stipulation, thereupon in accordance with said stipulation, this cause was this day submitted to the Court upon the statement of facts aforesaid, as to the said parties to said stipulation and as to the
14 portion of land therein described, and neither party having offered any evidence outside of the said agreed statement of facts, and not desiring to do so, thereupon the said case, so far as it is submitted to the Court as aforesaid, was argued by counsel for both parties, and the Court not being advised of its judgment therein, takes time to consider thereof.

The plea referred to in the foregoing order *in is* the words and figures following:

*Plea.*

ELIZA T. FAY and WILLIAM FAY, Plaintiffs,
vs.
S. A. CROZER et al., Defendants.

In Trespass and Ejectment.

Depending in the Circuit Court of the United States for the Southern District of West Virginia, at the City of Charleston.

The defendants, Samuel A. Crozer, John P. Crozer and Mary Crozer Page, trustees, of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal & Coke Company for plea in this behalf say that they are not guilty of unlawfully withholding the premises claimed by the plaintiffs in the declaration in this cause mentioned, and of this they put themselves upon the country.

SAMUEL A. CROZER,
JOHN P. CROZER,
MARY CROZER PAGE,
*Trustees of the Crozer Land Ass'n, by Counsel.*

STROTHER, TAYLOR & STROTHER,
RUCKER, ANDERSON & HUGHES,
WYNDHAM STOKES,
*Attorneys.*

15 (Endorsed:) Eliza T. Fay et al. vs. Samuel A. Crozer et al. In Ejectment. Plea. Circuit Court U. S. So. Dis. W. Va. Filed in open Court this 13th day of Nov. 1906. Edwin M. Keatley, Clerk.

The stipulation in writing marked Exhibit A referred to in the foregoing order is in the words and figures as follows:

*Agreed Statement of Facts and Stipulations.*

WILLIAM FAY and ELIZA T. FAY, His Wife, Plaintiffs,
vs.
SAMUEL A. CROZER, JOHN P. CROZER, MARY CROZER PAGE, Trustees of the Crozer Land Association, et al., Defendants.

In Trespass and Ejectment.

Pending in the Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

It is stipulated and agreed between the plaintiffs and the defendants in the above action, Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees as aforesaid, Houston Coal & Coke Company, and Turkey Gap Coal & Coke Company, by their respective counsel as follows:

(*a*) That said action shall be tried at the present term only and only as to the parties hereto as to the undivided half interest claimed by the plaintiff in that portion of the land described in the declaration which is embraced within the interlock of the twelve hundred acres Fay-Austin patent, with three deeds from the Commissioner of School Lands hereinafter set out.

(*b*) That said action as to said part is to be submitted to
16 and tried by the Judge, a jury being waived, with like effect as if tried by a jury and judgment rendered upon an instruction of the court to find for the plaintiffs or defendants as the case might be with all rights of appeal or to a writ of error in all respects preserved to the losing party.

(*c*) That such submission and trial shall be upon the following agreed statement of facts, which shall be and constitute a part of the record so made by a proper order, and which statement of facts shall in all respects be binding upon the said parties hereto as to said portion of said tract of land only.

*Statement of Facts.*

It is agreed for the purpose aforesaid, and not otherwise, between the said parties this twelfth day of November, 1906, as follows, to-wit:

1. That such trial and this statement shall be limited to the part of the tract of land in controversy which is, as is shown on the map of surveyor W. R. Graham, filed in said action, by the following lines and letters:

Beginning at T; thence to D; thence to E; thence to F; thence to S; thence to T.

2. That the 1200 acre tract in the declaration described was granted by the Commonwealth of Virginia to plaintiff Eliza T. Fay and Samuel W. Austin by patent dated January 3rd, 1860, as set forth in the copy of said patent herewith filed, and to be read herewith, marked "99."

3. That at and before the date of said patent Eliza T. Fay was a married woman, wife of said William Fay, and has continuously remained under coverture with the same husband up to and including the present time, and that they do now, and have since their marriage, lived together as man and wife.

17 4. That neither the said Eliza T. Fay nor William Fay have ever sold or conveyed any portion of said tract of land, or any interest therein.

5. That said tract of 1200 acres then and ever since lying in Elkhorn Township, McDowell County, West Virginia, was entered upon the land books of said county for taxation in Big Creek Township in said county as follows:

For the year 1865, "Fay, Eliza, and E. F. Harman, 1200 acres, Clayborne Ridge."

For the year 1866, "Fay, Eli and E. F. Harman, 1200 acres, Clayborne Ridge, Flat Top."

For the year 1867, "Fay, Eli, and E. F. Harman, 1200 acres, Clayborne Ridge."

For the years 1868 and 1869, "Fay, Eli and E. H. Harman, 1200 acres, Clayborne Ridge."

6. That said tract of land was never, from the date of the patent, 1860, up to the present year assessed for taxation, or entered upon the land books of either the State of Virginia or this State, or of any county of either of said States in the name or names of Eliza T. Fay or Samuel W. Austin or any one claiming title thereto in whole or in part under, by or through said patent, except for the years 1865, 1866, 1867, 1868 and 1869, as above shown, nor was said land, during any part of said period, entered for taxation in any other name except as hereinafter set out, and that no taxes have ever, at any time, for any year since the date of the patent, or for that year, to the present time, been paid on said land by said patentees, or by any one else, except as hereinafter set out, and that no taxes have been paid on said land by any one during said period, save and except by said trustees and those under whom they derive their claim of title as hereinafter set out, and that said lands so claimed by said trustees was entered for taxation on the land books of McDowell county, West Virginia, for the years and in the manner shown by the statement herewith filed, and to be read herewith,

18 marked "110", and that all proper taxes for state, county and district purposes for each of said years were duly levied and assessed thereon, and all taxes and assessments so charged thereon to said trustees, and those under whom they hold, were for each and every year, since they were so assessed as aforesaid, fully and promptly each year paid off and discharged as such taxes became due and payable, by said trustees and those under whom they claim.

7. That in the month of October, 1869, the sheriff of McDowell county made sale of the lands in said county returned delinquent for the non-payment of taxes of the years 1865 and 1866, and among the lands so returned delinquent and sold, was said tract of 1200 acres described in said assessment, delinquent and report of sale as follows:

"Fay, Eli, and E. F. Harman 1200 acres, Clayborne Ridge."

And that at the same sale the said sheriff also sold the lands in said county returned delinquent for the non-payment of taxes thereon of the years 1867 and 1868, and among the tracts so returned delinquent and sold was said tract described as follows:

"Fay, Eli, and E. F. Harman, 1200 a. Clayborne Ridge."

That at both said sales, that is to say, said sale under each of said delinquencies said sheriff purchased said tract of land for the State of West Virginia, and made return thereof, and that said lands have never since been redeemed from said delinquencies or sales or either of them.

8. That the sales above referred to and the sheriff's reports of same, and the returns thereof, and the record of such returns in the county court clerk's office, was subject to such irregularities, if any, as are shown by the certificates or copies thereof, filed herewith as a part hereof, and to be read herewith, marked "100" and "101."

19 9. That this action was instituted in the year 1901, the declaration and notice being dated February 26th, 1901, returnable to April rules, 1901, and service accepted, on behalf of said defendants March 15, 1901.

10. That said tract of 1200 acres, as well as the three tracts of 46, 113, and 1281 acres, hereinafter referred to, so far as they interlock with said 1200 acres have been correctly located by the surveyor in this action, W. R. Graham, and as shown by his plat and report, filed therein, which is to be read as part hereof.

11. That the said trustees, the holders of the legal title, for the Crozer Land Association, claim title to the larger part of said 1200 acres of land as well outside as inside of the bounds above set out, as limiting the lands to be affected by this trial; that their claim title to the part involved in the trial now to be had, and the facts in relation thereto are as follows:

On July 7th, 1882, Henry C. Auvil, Commissioner of School Lands, of said McDowell County, reported to the Circuit Court of said county as waste and unappropriated lands lying in said county, a tract averred to contain 5,000 acres, and which included all the land in controversy on the trial contemplated by this agreement. Upon said report said Court directed said Commissioner of School Lands to proceed against said land, and subsequently in a course of proceeding had in said Court based on said report, the said Commissioner of School Lands was directed to subdivide the said tract, and after such subdivision to sell same, all of which he accordingly did, and did sell *inter alia* the tracts set out below, to-wit: three of said subdivisions, which sales being directed by the Court, were by it afterwards confirmed, and said commissioner by it was authorized and directed to make deeds therefor to the respective purchasers, which he also did each of which said sales and deeds were by the

20 Court in said proceeding approved and confirmed, and which said deeds are as follows:

Deed to J. W. Harman for 46 acres;

Deed to William R. Belcher for 113 acres;

Deed to Straley, French & Welch, for 1281 acres,

All filed herewith, and to be read as part hereof, marked "1112,-"112" and "113" respectively.

12. That said three tracts of 46 acres, 113 acres and 1281 acres lie within the exterior pines of the said 1200 acre tract either in whole or in part, and that that portion of the 1200 acres which is involved in this trial is covered by said three deeds, and wholly composed of portions of said three tracts as shown by said surveyor's report and plat, already made a part hereof and to be read herewith.

13. That the proceedings under which said three tracts of land were sold was entitled "Henry C. Auvil, Commissioner of School Lands v. Waste and Unappropriatd Lands, and plaintiffs Eliza T. Fay and William Fay were not parties thereto (a copy of the record of said proceeding, so far as pertaining to the sale of said three parcels is herewith filed as a part hereof, and to be read herewith, marked "104").

14. That under said three deeds, which embrace and include within their bounds every part of the land embraced by and included within the bounds of the parcel as to which this trial is limited all the title to said three tracts, and under deeds subsequent from the grantees therein, and those holding under them, which passed by said deeds to said Harman to said Belcher and to said Straley, French & Welch, passed to and vested in the said trustees of the Crozer Land Association, all for value, and by intermediate deeds in proper form, with all, if any rights by reason of the payment of taxes, and actual possession hereinbefore and hereinafter stated.

15. That the said trustees and those under whom they claim have had such possession of the lands in controversy in this trial
21 and have exercised such acts of ownership in relation thereto as are hereinafter set forth, and now claim as part of their defence herein that they have at all times since the year 1887 have had and claimed adverse, continuous and exclusive possession of the same to the plaintiffs and all other persons of the said tract of land which claim of possession is denied and contested by the plaintiffs.

The following are the agreed facts upon which said claim of the defendants is based, and upon which the Court is to decide.

The three tracts of 46, 113 and 1281 acres were conveyed by Harman, Belcher and Straley, French & Welch, to Samuel A. Crozer, who subsequently conveyed them to the trustees of the Crozer Land Association. While the said tracts were held by Samuel A. Crozer and prior to the conveyance to the trustees of the Crozer Land Association, Samuel A. Crozer by deed of lease, bearing date December 12, 1887, leased to the Turkey Gap Coal & Coke Company a tract of land in McDowell county containing — acres, the property lines of which leasehold contained within its boundaries the eastern portion of the tract of land in controversy in this trial, and by deed of lease bearing date December 16, 1887, leased to Houston Coal & Coke Company a tract of land in McDowell county west of and adjoining the lease of the Turkey Gap Coal & Coke Company, which leasehold contained within its boundary the western portion of the tract of land in controversy in this trial, and all of the tracts of land in controversy in this trial were contained within the lines of these leaseholds. At the time the said leases were executed, the said Hous-

ton Coal & Coke Company and Turkey Gap Coal & Coke Company were in possession of the said leaseholds, which are as is shown on said Maham map so far as they interlock with said 1200 acres as belonging to them as lessees respectively, and their possession
22 of such leaseholds has continued unbroken and uninterrupted up to the present time.

The acts of possession of these lessees consisted of opening and developing large and expensive coal operations and coke plants on each leasehold; the erection of houses, coke ovens, tipples, etc., on the leaseholds, and occupying and using the same.

The permanent structures erected upon the lands in controversy in this trial consist of a fan, and two dwelling houses constructed upon that portion of the tract included in the Turkey Coal & Coke Company lease, which fan and houses were erected each in the year 1894, or early in 1895, and the said houses since that time have been occupied continuously by the tenants of the Turkey Gap Coal & Coke Company. During the life of the leases and commencing as far back as 1887, timber has been cut upon the tract of land in controversy by the said lessees of said Samuel A. Crozer and the Crozer Land Association, and continuing without interruption or interference since, and entries have been driven through the coal seams thereon underneath the surface, from the adjacent portions of the leasehold no openings having been made upon the surface of the land in controversy in this action except at the point designated on the map by the letter "X" which is on a contiguous tract claimed in fee since 1887 by said Crozer and said Trustees, where two entries are drizen through to the surface, and the fans established and two houses built as above mentioned, said entries having been driven through for the purposes of ventilation, and also for getting timber into the mine, and also for the purpose of shipping coal commercially therefrom, and they have been used since they were opened for the two first named purposes, but have not been used for the last named purpose, and coal has been mined from the said land in controversy on this trial by means of the entries aforesaid since the year 1893 continuously and without interruption during the whole
23 period, and now continued by a large force of employees of the lessee, but all of said coal so mined on the land in controversy to be shipped from said mines commercially, was taken out through mine openings outside of the land in controversy in this trial, but within the boundaries of said leasehold, but coal has been taken out of the openings at the fan at letter "X" on the map to be used in running said fan, and for domestic use at said two houses near the fan. All the facts of possession aforesaid were done under claim of title, under the deeds aforesaid from Henry C. Auvil, commissioner of School Lands, to Belcher, Harman and Straley, French and Welch, and the intermediate deeds under which the defendants claim. Said possession during all that time being claimed by the defendants to be, and being by them intended to be, adverse to the world, and neither the plaintiffs Eliza T. Fay nor her husband, William Fay, nor any co-tenant nor any tenant, representative, or person claiming under them, or any of them, have ever at any time

since the date of said patent for 1200 acres been in actual possession of said tract of 1200 acres, or any part thereof, but instead, until the taking of possession thereof by the defendants, the said tract of land was wild and uncultivated.

16. That the claim of the plaintiffs is only an undivided one-half interest in fee simple in Eliza T. Fay in said 1200 acres, and on this trial only to a like interest in the portion of said tract involved in this suit.

17. It is agreed that the value of the land in controversy on this trial is in excess of five thousand dollars.

ELIZA T. FAY,
WILLIAM FAY,
By PRICE, SMITH, SPILMAN & CLAY,
*Counsel.*

SAMUEL A. CROZER,
JOHN P. CROZER,
MARY CROZER PAGE,
24 *Trustees of the Crozer Land Association.*
HOUSTON COAL & COKE COMPANY,
TURKEY GAP COAL & COKE COMPANY,
By BROWN, JACKSON & KNIGHT,
RUCKER, ANDERSON, STROTHER & HUGHES, *Counsel.*

(Endorsed:) Wm. Fay et ux. vs. S. A. Crozer et al. Ejectment. Agreed statement of facts and stipulation. "Exhibit A." Circuit Court U. S. So. Dist. W. Va. Filed in open Court this 13th day of November, 1906. Edwin M. Keatley, Clerk.

The several exhibits and papers referred to in the foregoing agreed statement of facts and read as evidence upon the submission of this case are in the words and figures as follows:

*Copy of Grant No. 99.*

John Letcher, Esquire, Governor of the Commonwealth of Virginia, to all whom these Presents shall come, Greeting:

Know ye, That in conformity with a survey made on the seventeenth day of June, one thousand eight hundred and fifty eight, by virtur of Land Office Treasury Warrant No. 25042 there is granted by the said Commonwealth unto Eliza T. Fay and Samuel W. Austin a certain tract or parcel of land containing 1200 acres lying in Tazewell County on Clayborne's ridge, a spur of the Flat Top mountain and on the end of Ferguson's Ridge and on other spurs,
25 hollows and branches waters of the north fork of Elkhorn Creek of Tug River, adjoining a 350 acre survey in the name of William L. Graham and Robert C. Graham and bounded as follows, viz: Beginning at three beeches, lynn, two birches and poplar on the bank of the Turkey Gap Fork of Elkhorn a corner to said 350 acres; thence with four lines thereof N. 61 W. 175 poles to two

poplars, two cucumbers and white walnut on the top of the Claiborn ridge at the junction of John's Knob Ridge, the beginning corner of said 350 acres, thence continuing with the said survey S. 61½ W. 40 poles along the top of said ridge to three chestnut oaks on top of the same, thence S. 89 W. 144 poles, crossing John's Knob branch and crossing hollows and spurs to a chestnut, sourwood and wahoo on the point of a spur; thence S. 68¾ W. 120 poles to a station in said line, thence leaving said survey N. 35 deg. W. 340 poles to a stake, thence N. 65 deg. E. 470 poles to a stake; thence S. 40 E. 310 poles to a stake; thence S. 5 deg. E. 300 poles to the beginning with its appurtenances.

To have and to hold the said tract or parcel of land, with its appurtenances, to the said Eliza T. Fay and Samuel W. Austin and their heirs forever.

In witness whereof, the said John Letcher Esquire, Governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed at Richmond, on the third day of January in the year of our Lord one thousand eight hundred and sixty, and of the commonwealth the 84th.

[SEAL.] JOHN LETCHER.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office. Witness my hand and seal of office, this 20th day of March, 1895.

SYDNEY P. EPES, [SEAL.]
*Register of the Land Office.*

26 (Endorsed:) U. S. S. C. C. S. D. W. Va. Eliza T. Fay et al. v. Samuel A. Crozer et al. In Ejectment. "99." (Copy of Grant.) Filed November 13, 1906. Edwin M. Keatley, Clerk.

*Abstract from Land Books.*

1281 Acres.

"No. 110."

*Statement from the Land Books of McDowell County, West Va.*

| Year. | Name. | Acres. | Description. |
|---|---|---|---|
| 1884 | Crozier, S. A..... | 1281 | On the waters of Elkhorn. |
| | Same..... | 113 | Same. |
| 1885 | Crozer, S. A..... | 113 | On waters of Elkhorn. |
| | Crozer, S. A..... | 1281 | Same. |
| 1886 | Crozer, S. A..... | 1281 | Same. |
| | Same..... | 113 | Same. |
| | Same..... | 108 | Same "From W. R. Belcher." |
| | Harman, J. W..... | 46 | Bet. N. F. Tug & Elkhorn "From H. C. Auvil." |

| | | | |
|---|---|---|---|
| 1887 | Crozer, S. A..... | 1281 | On waters of Elkhorn. |
| | Same..... | 113 | Same. |
| | Same..... | 108 | Same. |
| | Harman, J. W..... | 46 | Between N. F. Tug & Elkhorn. |
| 1888 | Crozer, S. A..... | 1281 | On waters of Elkhorn. |
| | Same..... | 313 | Same. |
| | Same..... | 108 | Same. |
| | Same..... | 46.3 | Same. |
| 1889 | Crozer, Samuel A..... | 1281 | Same. |
| | Same..... | 113 | Same. |
| | Same..... | 108 | Same. |
| | Same..... | 46.2 | Same. |
| 1890 | Same..... | 1281 | Waters of Elkhorn. |
| | Same..... | 113 | Same. |
| | Same..... | 108 | Same. |
| | Same..... | 46.3 | Same. |
| 1891 | Same..... | 1281 | Elkhorn waters. |
| | Same..... | 113 | Same. |
| | Same..... | 108 | Same. |
| | Same..... | 46.3 | Waters of Elkhorn. |
| 1892 | Same..... | 1135.42 | S. F. Elkhorn. |
| 27 | Same..... | 103.91 | Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1893 | Same..... | 1135.42 | S. F. Elkhorn. |
| | Same..... | 103.91 | Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1894 | Crozer Land Association..... | 1135.42 | South Fork Elkhorn. |
| | Same..... | 104.04 | Elkhorn. |
| | Same..... | 20.45 | Waters Elkhorn. |
| 1895 | Same..... | 1135.42 | South Fork Elkhorn. |
| | Same..... | 104.04 | Waters Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1896 | Same..... | 1135.42 | Waters S. F. Tug. |
| | Same..... | 104.04 | " Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1897 | Same..... | 1135.45 | Waters S. F. Tug. |
| | Same..... | 104.04 | " Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1898 | Same..... | 1135.45 | Waters S. F. Tug. |
| | Same..... | 104.04 | Waters Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1899 | Same..... | 1135.45 | Waters S. F. Tug. |
| | Same..... | 104.04 | Waters Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1900 | Same..... | 1150.53 | Waters S. F. Tug. |
| | Same..... | 103.73 | Waters Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1901 | Crozer Land Association..... | 1150.23 | Waters S. F. Tug. |
| | Same..... | 103.73 | Waters Elkhorn. |

| | | | |
|---|---|---|---|
| | Same..... | 20.45 | Same. |
| 1902 | Same..... | 1150.23 | Waters S. F. Tug. |
| | Same..... | 105.73 | Waters Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1903 | Same..... | 1150.23 | Waters S. F. Tug. |
| | Same..... | 103.73 | Waters Elkhorn. |
| | Same..... | 20.45 | Same. |
| 1904 | Same..... | 1150.23 | Waters S. F. Tug. |
| | Same..... | 103.73 | Elkhorn Waters. |
| | Same..... | 20.45 | Same. |
| 1905 | Same..... | 1150.23 | Waters S. F. Tug. |
| | Same..... | 103.73 | Elkhorn waters. |
| | Same..... | 20.45 | Elkhorn. |

STATE OF WEST VIRGINIA,
*County of McDowell, To wit:*

I, R. B. Bernheim, Clerk of the County Court of McDowell County, do certify that the foregoing is a correct statement from the land books of McDowell County showing the entry thereon of the tracts of land aforesaid for the years mentioned, and I do further certify that said tracts of land have not been returned delinquent for any of said years in any of said names, or sold for the non-payment of taxes for said years.

Given under my hand and the seal of said Court at Welch, this 16th day of May, 1906.

[SEAL.] R. B. BERNHEIM, *Clerk.*

28 (Endorsed:) Abstract from land books. 1281 acres. Fay vs. Crozer. In Ejectment. "110." **Circuit Court U. S. So.** Dist. W. Va. Filed in office this 19th day of May, 1906. Edwin M. Keatley, Clerk.

*Delinquent Land Sale.*

1869. No. 100.

A List of Real Estate Within the County of McDowell for the Non-Payment of Taxes Thereon for the Years 1865 and 1866 Sold in the Month of October, 1869, and Purchased for the State of West Virginia.

Names of persons: Fay, Eli & E. F. Harman.
Acres: 1200.
Locality: Claiborn Ridge.

| | | | |
|---|---|---|---|
| State and School tax for 1865 including ints. & Damages ..... | 1 | 20 | .46 |
| State & School tax for 1866 including insts. & damages. | 1 | 20 | .37 |
| Total of all taxes *dec.* including & damages... | | | 3 23 |

* * * * * * *

I, Smith Trent, Sheriff of the County of McDowell, do swear

that the above list contains a true account of all the real estate within my county which has been sold by me during the present year for the non-payment of taxes thereon for the years 1865, 66, 67 & 68 and that I am not directly nor indirectly interested in the purchase of any of the Real Estate. So help me, God.

P. LAMBERT,
*Justice of Sandy River T. P., McD. Co., W. Va.*

29 STATE OF WEST VIRGINIA,
*County of McDowell, To-wit:*

I, R. B. Bernheim, Clerk of the County Court of McDowell County, do hereby certify that the foregoing is a true and correct copy from the records of said office, as the same exists therein in delinquent land sales No. 1 page 2, so far as said record relates to the sale of the tract of land above mentioned, and that said record does not show when the above named list was returned by the sheriff to this office.

Given under my hand and the seal of said Court at Welch, this the 7th day of November, 1906.

[SEAL.] R. B. BERNHEIM, *Clerk.*

(Endorsed:) U. S. C. C. S. D. W. Va. Eliza T. Fay et al. v. Samuel A. Crozer et al. In Ejectment. No. 100. Delinquent land sale. 1869. 1200 acres. Fay, Eli & E. F. Harman. Circuit Court U. S. S. Dis. W. Va.. Filed in open Court this 13th day of Nov. 1906. Edwin M. Keatley, Clerk.

*Delinquent Sales, Fay and Harman,* 1200 *Acres.*

No. 101.

A List of Real Est. within the County of McDowell Sold in the Month of Oct., 1869, for the non-Payment of Taxes Thereon for the Years 1867 and 1868, and Purchased for the State of West Virginia. Sold to State.

Names of persons: Fay, Eli & E. F. Harman.
Qt. L.: 1200.
30 Locality: Clayborn Ridge.

| | | |
|---|---|---|
| —— | 2.40 | .60 |
| State tax for years 1867 and damage | 1.65 | .33 |
| School tax for 1868 including & damages | —— | 4.98 |

* * * * * * *

I, Smith Trent, Sheriff of McDowell County, do swear that the above list contains a true account of all the real estate within my county which has been sold by me during the present year for the non payment of taxes thereon for the years 1865, 1866, 1867 and 1868, and that I am not directly or indirectly interested in the purchase of any of the real estate. So help me, God.

P. LAMBERT,
*Justice of Sandy River Township, McDowell County.*

STATE OF WEST VIRGINIA,
*County of McDowell, To wit:*

I, R. B. Bernheim, Clerk of the County Court of McDowell County, do certify that the foregoing is a true and correct copy from the records of said office, as the same exists therein in delinquent land sales, No. 1, page 24, so far as said record- relate to the sale of the tract of land above mentioned, and that said record does not show when the above named list was returned by the sheriff to this office.

Given under my hand and the seal of said Court, at Welch, this the 7th day of November, 1906.

[SEAL.] R. B. BERNHEIM, *Clerk.*

(Endorsed:) U. S. S. C. C. S. D. W. Va. Eliza T. Fay et al. vs. Samuel A. Crozer et al. In Ejectment. "No. 101." Copy
31 Delinquent Sales. Fay and Harman 1200 a. 1869. Circuit Court U. S. So. Dis. W. Va. Filed in open Court this 13th day of Nov. 1906. Edwin M. Keatley, Clerk.

No. 111.

Deed H. C. Auvil, Com'r,
to
J. W. Harman.

This deed made this 2nd day of June, 1885, between H. C. Auvil, Commissioner of School Lands for the county of McDowell of the first part and J. W. Harman of the County aforesaid, of the second part,

Witnesseth: That whereas the said party of the first part in pursuance of the authority vested — him by a decree of the Circuit Court of the County of McDowell made on the 4th day of October 1882 in a proceeding by petition on the chancery side of said court "In the matter of School Lands therein pending in which the party of the first — as Commissioner of School Lands for the County of McDowell was plaintiff against a body of waste and unappropriated land did sell the real estate hereinafter mentioned and conveyed according to the terms and conditions required by said decree at which sale the *the* said J. W. *Hammans* became the purchaser for the sum of Ten ($10.00) Dollars and the said Court having by a subsequent decree made in the said cause and proceedings on the report of the sale *sale* having been duly made and filed, confirmed the said sale on the 5th day of April 1883 to the said J. W. *Hamman* and the said J. W. *Hamman* havin- fully paid the said purchase money and the same having been duly reported to said Court and said report confirmed the said Court on the — day of ——, 188– by an order entered in the cause aforesaid directed a deed for the said real estate to — made to the said J. W. H*amman* by the said party of the first part.

Now Therefore, this deed Witnesseth that the said H. C.
32 Auvil, Commissioner of School Lands as aforesaid, has this day granted and conveyed unto the said J. W. Hamman,

party of the second part the following real estate situate in the County of McDowell on the waters of John Knob Branch of Elkhorn adjoining tract No. — referred to and described in the report of the said H. C. Auvil, Commissioner of School Lands as aforesaid and filed in the proceedings and cause aforesaid, the tract hereby conveyed numbered in said report 16, and is bounded and described as follows: Beginning at a chestnut *chestnut* and chestnut oak in Maitland line and with it S. 32½ E. 240 poles to a stake in a line of 350 acres of George Hamman S. 89 W. 75 poles to two chestnuts sourwood and poplar on a spur N. 10 W. 190 poles to the beginning with its appurtenances containing by survey forty-six acres and being part of the waste and unappropriated land mentioned and described in the papers and proceedings of said cause. To have and to hold the said real estate and premises with all the right, title and interest of the state therein to the said J. W. Hamman his heirs and assigns forever.

Witness the following signature and seal.

HENRY C. AUVIL,
*Commissioner of School Lands.* [SEAL.]

WEST VIRGINIA,
*County of McDowell, To-wit:*

I, Jno. F. Johnson, Clerk, certify that H. C. Auvil, whose name is signed to the foregoing deed bearing date the 2nd day of June, 1885, has this day acknowledged the same before me in my County aforesaid.

Given under my hand this — day of June, 1885.

JNO. F. JOHNSON,
*Clerk of McDowell County Court.*

WEST VIRGINIA:

In McDowell County Clerk's Office the 24th Day of December, 1885.

This deed together with the certificate thereto annexed was this day presented to me in my office and thereupon the same was admitted to record in deed book 7, page 683.

Teste: JNO. F. JOHNSON, *Clerk.*

STATE OF WEST VIRGINIA,
*County of McDowell, To-wit:*

I, R. B. Bernheim, Clerk of the County Court of McDowell County, do hereby certify that the foregoing is a true copy from the records of my office, as the same now exist therein, in deed book No. 7, page 683.

Given under my hand and the seal of said Court, at Welch, this the 15th day of May, 1906.

[SEAL.] R. B. BERNHEIM, *Clerk.*

33 (Endorsed:) H. C. Auvil, Com'r, To J. W. Harmon. Copy Deed (27). Eliza T. Fay et al., vs. Samuel A. Crozer et al. In Ejectment. "III." Circuit Court U. S., S. D. W. Va. Filed in

open Court this 13th day of November, 1906. Edwin M. Keatley, Clerk.

This deed made this 12th day of April, 1884, between Henry C. Auvil, Commissioner of School Lands for McDowell County, W. Va., party of the first part and W. R. Belcher of the second part,

Witnesseth, That whereas the said party of the first part, as commissioner as aforesaid in pursuance of the authority vested in him by an order of the Circuit Court of McDowell County in the matter of School Lands in which the said party of the first part was plaintiff against *against* a body of waste and unappropriated lands situated in said County, did on the — day of January, 1883, at the front door of the Court house of said County, after having given the notice required by law, and in the mode and manner prescribed by law, sell the tract of land and real estate hereinafter described at which sale James R. Belcher being the highest bidder became the purchaser thereof at the sum of Fifteen Dollars and whereas said sale having been duly reported to said Circuit Court was on the — day of April 1883, duly confirmed to the said W. R. Belcher and the said W. R. Belcher having paid the full amount of said purchase money aforesaid which has been reported to said Circuit Court which Court on the 11th day of April, 1884, having confirmed said report and directed the party of the first part, as commissioner aforesaid to convey said tract of land hereinafter described by meets and bounds to the said William R. Belcher in accordance with the recent
34 and correct survey of said tract of land now therefore in consideration of the premises the party of the first part as Commissioner aforesaid doth grant and convey unto the said W. R. Belcher the said tract of land situate in McDowell County and State aforesaid on Clark's Branch Ridge at the head of Rooting Camp Branch, Beginning at two small chestnuts, and black gum in a line of the Wilson Cary Nicholas 500,000 acres leaving same S. 25 W. 16.65 chains to a chestnut oak on top of said ridge at the head of Rooting Camp Branch S. 83 W. 4.45 chains to a large chestnut oak, and small chestnut on a spur S. 62.45 W. 7.10 chains to three large chestnuts on a point S. 75 06 W. 6.55 chains to a small chestnut and chestnut oak on the west side of a point N. 29 W. 28.25 chains crossing Rooting Camp Branch at 6.00 chains to a station on the waters of Trace branch N. 38 36 E. 32.27 chains to a large black oak and hic*h*ory and two poplars sprouts on top of Claiborn's Ridge in the line of W. C. Nicholas 500,000 acres and with same S. 30.18 E. 32 85 chains crossing a hollow to the beginning, containing one hundred and thirteen acres. To have and to hold the said tract of land with its appurtenances unto the said W. R. Belcher and his heirs and assigns forever with all the interests of the State of W. Va. therein and thereunto.

Witness the following signature and seal.

HENRY C. AUVIL,
*Com'r of School Land.* [SEAL.]

STATE OF WEST VIRGINIA,
*McDowell County, To-wit:*

I, D. H. Harman, Notary Public for the County of McDowell in the State aforesaid certify that Henry C. Auvil, whose name is signed to the foregoing writing bearing date on the 11th day of April, 1884, this day acknowledged the same before me in my county aforesaid. Given under my hand this 12th day of April, 1884.

D. H. HARMAN,
*Notary Public.*

WEST VIRGINIA:

In McDowell County Court Clerk's Office, April 14th, 1884.

35 The foregoing deed was this day presented to me in said office for record, and thereupon together with the annexed certificate duly recorded in deed book 7, page 150.

Teste: JNO. F. JOHNSON, *Clerk.*

STATE OF WEST VIRGINIA,
*County of McDowell, To-wit:*

I, R. B. Bernheim, Clerk of the County Court of McDowell County, do hereby certify that the foregoing is a true copy from the records of my office, as the same now exist therein, in deed book No. 7, page 150.

Given under my hand and the seal of said Court, at Welch, this the 15th day of May, 1906.

[SEAL.] R. B. BERNHEIM, *Clerk.*

(Endorsed:) H. C. Auvil, Com'r to W. R. Belcher. Copy Deed. (22) Eliza T. Fay et al. vs. Samuel A. Crozier, et al. In Ejectment. "112." Circuit Court U. S. S. D. W. Va. Filed in open Court this 13th day of Nov. 1906. Edwin M. Keatley, Clerk.

No. 113.

H. C. Auvil
to
I. A. Welch et al.

This deed made this 11th day of April, 1884, between Henry C. Auvil, Commissioner of School Lands for McDowell County, West Virginia, party of the first part and I. A. Welch, H. W. Straley, C. W. Straley and W. A. French of the second part,

Witnesseth, That whereas the party of the first part as
36 Commissioner as aforesaid in pursuance of the authority vested in him by an order of the Circuit Court of McDowell county in the matter of school lands in which the said party of the first part was plaintiff against a body of waste and unappropriated lands situate in said county, did on the second day of January 1883, at the front door of the Court House of said County after having the

notice required by law and in the mode and manner prescribed by law sell the tracts of land and real estate hereinafter described at which sale I. A. Welch, H. W. Straley, C. W. Straley and W. A. French being the highest and best bidders, became the purchasers thereof at the aggregate sum of one hundred and ninety dollars, and

Whereas, said sale having been duly reported to said Circuit Court was on the 5th day of April, 1883 duly confirmed to the said I. A. Welch, H. W. Straley, C. W. Straley and W. A. French, having paid the full amount of the purchase money aforesaid which has been reported to said Circuit Court, which court on the 11th day of April, 1884, having confirmed said report and having directed the party of the *of the* first part as commissioner aforesaid to convey said tracts of land hereinafter described by metes and bounds to the said I. A. Welch, H. W. Straley, C. W. Straley, and W. A. French, in accordance to the recent and corrected surveys of said tracts of land. Now therefore, in consideration of the premises, the party of the first part, as commissioner aforesaid, doth grant and convey unto the said I. A. Welch, H. W. Straley, C. W. Straley, and W. A. French said tracts of land situate in the county of McDowell and State aforesaid on the waters of South and North forks of Elkhorn and on Claiborne's Ridge and described as follows, to-wit:

Beginning at a small black oak and hic*h*ory on top of Johns Knob ridge corner to J. A. Belchers 546 acres and I. H. Harman and with lines of the latter, N. I. 05 E. 34.25 chains crossing spurs to a small hic*h*ory on a spur above a cliff N. 38.50 W. 15.10 chains to a small hic*h*ory on Buzzard Nest Spur N. 69.27 E. 29.00 chains to a large chestnut and Wahoo Sap*p*ling on a point N. 89 E.
37 9 15 chains to three chestnuts and sourwood on a point in a line of the Wilson Cary Nicholas 500,000 acres and with the same reversed N. 30 18 W. 85.50 chains crossing John's Knob Branch at 12.40 chains and Claiborne's Ridge to two small chestnuts and black Gum on east side of ridge near the head of Rooting Camp Branch S. 25.20 W. 16.65 chains to a chestnut on top of Claiborne's Ridge at the junction of Rooting Camp ridge with same S. 83 W. 4.45 chains to a large chestnut oak and small chestnut on a spur S. 62.45 W. 7.10 chains to three large chestnuts on a point S. 75 W. 6.55 chains to small chestnut and chestnut oak on the west side of a point N. 29 W. 28.25 chains crossing Rooting Camp Branch at 6 chains to a station *an* on waters of trace branch, N. 38.30 E. 32.77 chains crossing said branch to a large Black Oak and Hic*h*ory and two poplar sprouts on top of Claiborne's ridge, at the head of middle Fork of Trace branch in a line of Wilson Cary Nicholas 500,000 and with same reversed N. 30 18 W. 38.85 chains to a chestnut chestnut oak and two dogwoods on a spur near the top of Claiborne's ridge, S. 38.53 W. 4.00 chains to two chestnuts and dogwood on top of a Knob of Claiborne's ridge, corner to 106 acres and with lines of same S. 29.20 E. 6.62 chains to a chestnut oak on a ridge S. 12.15 E. 5.50 chains to a small chestnut oak and chestnut on top of said ridge S. 37.35 E. 7.40 chains to a chestnut and spotted oak on top of a ridge and leaving same and down a spur N. 58 W. 11.15 chains to four chestnut oaks on said spur N. 74.63 W. 11.75 chains to two

chestnut oaks on said spur, S. 64.15 W. 850 chains to four chestnut oaks, gum and small black pine on a spur corner to 398 acres S. 58.20 W. 23.75 chains to double and single chestnut oaks on a spur corner to 496 acres and with lines of same S. 15.30 E. 65.75 chains crossing Lick branch at 39 chains to a chestnut oak poplar and hic*h*ory on south of Rooting camp ridge, S. 64.30 W. 84.25 chains crossing spurs and hollows to a small white walnut at a lower end of Peery Bottons, Beginning corner of said 496 acres S. 88.30 E. 1.65
38 chains to a spruce pine and gum and a bank S. 61 E. 27.00 chains to two white oak sapplings on a bank at west end of a cliff N. 55 E. 10.65 chains to a stake gum and spruce pine pointers corner to J. A. Belchers tract and with lines of same reversed N. 70 E. 15.00 chains to cliff on a spur west of Bowens Belchers house N. 78 E. 47.11 chains crossing *B*ooting Camp branch to a poplar and chestnut oak on the side of a ridge, S. 50.20 E. 9.19 chains crossing John's Knob branch to a spruce pine on a point above a cliff S. 36.30 E. 35.12 chains to a large leaning white oak and locust on the side of a ridge S. 11.40 E. 15.55 chains to a large spruce pine in a rocky place S. 15.10 W. 13.20 chains to a white oak and chestnut oak on bank near Elkhorn S. 42.50 E. 25.10 chains to a spruce pine and birch on a cliff by the road N. 19.30 W. 23.15 chains to a chestnut and white oak on top of a spur N. 45 10 E. 10.00 chains to two red oaks a black oak and chestnut on top of a spur N. 7.15 E. 8.50 chains to a stake on the side of a ridge S. 82.30 E. 5.00 chains to the Beginning, containing 1281 acres.

And tract No. 2 in this conveyance lying on North Fork of Elkhorn and adjoining Jane Milam 140 acres, beginning at two beeches and a maple on a point opposite Roland Burk's house corner to Jane Milam and others S. 9.25 E. 15.90 chains up a point to a chestnut and hic*h*ory on a point about one chain from a spring corner to Andrew Milam and with same S. 85 E. 6.82 chains to a white oak and maple on the side of a ridge near a drain S. 23 E. 12.50 chains to a large hic*h*ory on a spur S. 64.15 E. 4.50 chains up said point to a chestnut oak and chestnut on same S. 11 E. 16.05 chains to a hic*h*ory and cucumber sap*p*ling in a cove S. 77.10 E. 26.25 chains passing above Andrew Milams house to a sourwood (dead) on north side of a knob of Claiborne's ridge S. 58.36 E. 41.75 chains crossing the head of a Fork of trace branch to two chestnuts on top of a knob of Claiborne's ridge N. 38.35 E. 4.00 chains down a spur to a chestnut chestnut oak and two dogwoods on same in a line of Wilson *Cray* Nicholas 500,000 acres and with a line of same reversed, N. 30 18 W. 51.30 chains crossing a spur at 16.75 chains, Jane Milam's
39 house at 27.50 chains crossing Elkhorn to a station near same N. 65 W. 60.40 chains crossing Elkhorn to the beginning containing two hundred and seventeen acres to have and to hold the said two tracts of land and their appurtenances unto the said I. A. Welch, H. W. Straley, C. W. Straley and W. A. French and their heirs and assigns forever with the interest of the State of West Virginia therein and thereto.

Witness the following signature and seal.

HENRY C. AUVIL,
*Com'r of School Lands.* [SEAL.]

STATE OF WEST VIRGINIA,
*County of McDowell, To-wit:*

I, D. H. Harman, a notary public within and for the county and state aforesaid do certify that Henry C. Auvil whose name is signed to the foregoing and annexed writing bearing date the 11th day of April, 1884, has this day acknowledged the same before me in the county aforesaid.

Given under my hand this 12th day of April, 1884.

D. H. HARMAN,
*Notary Public.*

STATE OF WEST VIRGINIA:

In McDowell County Court Clerk's Office, May the 1st, 1884.

The foregoing deed was this day presented to me in said office and thereupon together with the annexed certificate duly recorded in deed book N 7, page 159, etc.

Teste:

JNO. F. JOHNSON, *Clerk.*

STATE OF WEST VIRGINIA,
*County of McDowell, To-wit:*

I, R. B. Bernheim, Clerk of the County Court of McDowell County, do hereby certify that the foregoing is a true copy from the records of my office, as the same now exist therein, in Deed Book No. 7, page 159 et seq.

Given under my hand and the seal of said Court at Welch, this the 11th day of May, 1906.

[SEAL.] R. B. BERNHEIM, *Clerk.*

40 (Endorsed:) H. C. Auvil to I. A. Welch et al. Copy Deed. Eliza T. Fay et al. vs. Samuel A. Crozer et al. In Ejectment. "113." Circuit Court U. S. S. D. W. Va. Filed in open Court this 13th day of Nov. 1906. Edwin M. Keatley, Clerk.

No. 104.

ELIZA T. FAY et al.
vs.
SAMUEL A. CROZER et al.

9,000 Acres.

*School Land Sales of Waste and Unappropriated Lands for Sale in McDowell County.*

In the Matter of School Lands.

By virtue of an order of the Circuit Court of McDowell County rendered on the 4th day of October, 1882, in the matter of School

Lands, the undersigned, H. C. Auvil, Commissioner of School Lands for said county, will on Tuesday the
2nd Day of January,
(Remainder of this order torn off.)

I hereby certify that the annexed sales of school lands were published for four successive weeks in the McDowell Progress, a weekly newspaper published at the town of Peerysville, McDowell County, West Virginia.

Given under my hand this 18th day of Dec. 1882.

J. R. GREENWALT, *Editor.*

41 STATE OF WEST VIRGINIA,
*McDowell County, To wit:*

H. C. Auvil, personally appeared before me and made oath that *the* notices of sale required to be posted by a decree in this cause were duly posted as directed by said decree,
March 20, 1883.

JOHN F. JOHNSON,
*Clerk of McDowell Circuit Court.*

OFFICE OF COM'R OF SCHOOL LANDS, *March* 20, 1883.

To the Hon. David E. Johnston, Judge of the Circuit Court of McDowell County:

In pursuance of an order of your Honor's Court made at the October Term thereof, 1882, in the matter of School Lands, directing sale of a body of waste and unappropriated lands in this county.

Your Commissioner begs leave to report that after giving notice of the time, place and terms of sale, by advertising the same in the McDowell Progress, a newspaper published at Peerysville McDowell County, W. Va., for four successive weeks and by posting on the front door of the Court House of said County and five other of the most public places in said County for thirty days next preceding the sale, as directed by decree. Your Com'r on the 2nd day of January, 1883, that being the first day of the January term of McDowell County Court (1883) proceeded to sell the greater part of the waste and unappropriated lands in said decree mentioned, at the Court House of said County according to the direction of said decree and according to the terms set forth in the notice, copy of notice of sale, affidavit of posting, plats of the lands sold and the bonds given by the purchasers are herewith filed as part of this report. The following named persons became the purchasers at the sale: of the lands hereinafter described, at the prices
42 hereafter named, to-wit:

Tract No. 1.—Containing 86 acres, lying on Elkhorn Creek, was sold to James Mullins for $15.00 one-fourth of which was paid in cash, to-wit, $3.75, bond was given for deferred payment $11.25 with J. A. Welch, security.

Tract No. 2.—Containing 99 acres lying on Elkhorn, was sold to J. A. Welch and W. H. Merndon for $15.00, one-fourth of which was paid in cash ($3.75).

Tract No. 3.—Containing 100 acres situate on Elkhorn was sold to same for $40.00, one-fourth of which was paid in cash ($10.00).

Tract No. 21.—Containing 88 acres, lying on the south form of Elkhorn was sold to same for $20.00, one-fourth of which was paid in cash ($5.00) bond was given for the deferred payment on the said three tracts of land for $56.25, signed by I. A. Welch and W. H. Herndon.

Tract No. 4.—Containing 120 acres lying on the north fork of Elkhorn, was sold to Jane Milan for $20.00, one-fourth of which ($5.00) was paid in cash.

Tract No. 5.—Containing 75 acres lying on North Fork of Elkhorn was sold to same for $20.00, one-fourth of which $5 was paid in cash, bond given for $30.00, the deferred payment on said two tracts of land with D. H. Harman security.

Tract No. 6.—Containing 900 acres lying on South Fork of Elkhorn, etc. was sold to Jas. H. Shannon for J. H. Divine for $940.00, one-fourth of which, $235.00, was paid in cash, bond given for $705.00, the deferred payment with J. H. Shannon as surety.

Tract No. 7.—Containing 600 acres south Forks of Elkhorn was sold to C. W. Straley, H. W. Straley, W. A. French and I. A. Welch, for $130.00, one-fourth of which $32.50 was paid in cash.

43 Tract No. 8.—Containing 400 acres on Little Creek & Altizer Branch sold to same for $450.00, one-fourth of which $112.50 was paid in hand.

Tract No. 26.—Containing 118 acres on North Fork of Elkhorn was sold to same for $60.00, one-fourth of which, $15.00, was paid in cash, bond given for the deferred payment on the three last mentioned tracts of land for $480.00, signed by C. W. and H. W. Straley, W. A. French and I. A. Welch.

Tract No. 9.—Containing 40 acres on a branch and spur of south fork of Elkhorn was sold to G. P. Smith for $15., one-fourth of which $3.75, was paid in cash.

Tract No. 12.—Containing 100 acres on Puncheon Camp Branch etc. was sold to same for $20., one-fourth of which was paid in cash, to-wit, $5. bond given for deferred payment on said two tracts of land for $26.35, with Geo. W. Lamber security.

Tract No. 10.—Containing 100 acres on Puncheon Camp Branch etc. was sold to John Effler for $15. which was paid in cash.

Tract No. 11.—Containing 100 acres on Puncheon Camp Branch was sold to Calvin Taylor for $100.00, one-fourth of which $25.00 was paid in hand, bond given for deferred payment for $75.00, with D. H. Harman, security.

Tract No. 13.—Containing 100 acres on the Rock House Branch was sold to J. D. Lambert for $10.00, one-fourth of which was paid in cash, to-wit, $2.50, bond was given for the deferred payment for $7.50, with Geo. W. Lambert security.

Tract No. 14.—Containing 75 acres on North Fork of Elkhorn and Claiborne Ridge, sold to Thomas J. Mitchum for $15.00, one-fourth of which $3.75, was paid in cash, bond given for deferred payment for $11.25, with D. H. Harman, security.

44 Tract No. 15.—Containing 100 acres, lying on Rooting Camp Branch, South Fork of Elkhorn was sold to Wm. Belcher for $20. one-fourth of which, $5.00, was paid in cash, bond given for the deferred payment for $15.00, with James B. Milam as security.

Tract No. 16.—Containing 46 acres, lying on John Knob Branch Elkhorn, was sold to John W. Harman for $10.00, one-fourth of which $2.50 was paid in cash, bond given for the deferred payment for $7.50 with D. H. Harman security.

Tract No. 17.—Containing 100 acres on ridge between Elkhorn and Little Creek sold to Wm. Carter for $20.00, one-fourth of which, $5.00, was paid in cash, bond given for the deferred payment for $15.00 with Geo. W. Lambert security.

Tract No. 18.—Containing 115 acres lying on Puncheon Camp Branch etc. was sold to Lewis E. Carter for $25.00, one-fourth of which, $6.25, was paid in cash, bond given for deferred payments for $18.75, with Geo. W. Lambert security.

Tract No. 19.—Containing 20 acres, on Trace Branch of Little Creek was sold to R. D. Turner for $10.00, one-fourth of which $2.50, was paid in cash, bond given for the deferred payment for $7.50, with John Effler security.

Tract No. 20.—Containing 29 acres on Lower Shannon Branch Tug River was sold to J. D. Sergeant for $12.00.

Tract No. 28.—Containing 600 acres on upper and lower Shannon Branches of Tug River was sold to same for $100.00.

Tract No. 29.—Containing 190 acres, on Tug River was sold to same for $25.00.

Tract No. 30.—Containing 60 acres on Lower Shannon Branch of Tug River was sold to same for $20.00, making in the
45 aggregate 879 acres sold to the *the* said J. D. Sergeant for the sum of $157.00, all of which was paid in cash, to-wit $157.00.

Tract No. 22.—Containing 50 acres on Lower Shannon Branch of Tug River, was sold to Wm. S. England, for $15.00, which was paid in cash.

Tract No. 23.—Containing 55 acres, lying on Altizer's Branch etc. was sold to Isaac Lambert for $20.00, one-fourth was paid in cash, to-wit, $5. bond given for deferred payment to-wit: $15.00 with Geo. W. Lambert security.

Tract No. 24.—Containing 40 acres, on Altizer's Branch was sold to Ambrose Johnson for $10.00, one-fourth of which was paid in cash, $2.50, bond given for the deferred payment for $7.50, with John Effler as security.

Tract No. 25.—Containing 170 acres on Turkey Gap Branch of South Fork of Elkhorn was sold to J. A. Belcher for $30.00, which was paid in cash.

Tract No. 27.—Containing 32 acres on Tug River sold to T. M. Lester for $10.00, one-fourth of which, $2.50, was paid in cash.

Tract No. 31.—Containing 24 acres on Tug River, sold to same for $10.00, one-fourth of which, $2.50, was paid in cash, bond given for the deferred payment on said two tracts of land for $15.00, with J. F. Johnson as security.

Tract No. 32.—Containing 50 acres on Lower Shannon Branch of Tug River, was sold to Joseph England for $15.00, one fourth of which, $3.75, was paid in cash, bond given by T. M. Lester for the deferred payment for $11.25, with J. F. Johnson security.

Tract No. 33.—Containing 108 acres lying on Upper Shannon Branch of Tug River was sold to M. A. Lester for $54.00, one-fourth of which, $13.50, was paid in cash, bond given for the de-
46 ferred payment for $40.50, with A. Christian security.

Tract No. 34.—Containing 128 acres lying on Clear Fork etc. was sold to D. H. Harman, Jr., for $25.00, which was paid in cash.

| | |
|---|---|
| Whole No. of acres sold | 5018. |
| Amount sold for | $2316.00 |
| Cash payment | 579.00 |
| Defer'd " | 1737.00 |
| | 2316.00 |

Average price per acre, 46 1/6¢.

Expenses:

| | |
|---|---|
| 2 notices of sale | 25.00 |
| Surveyor & Chainman's fee | 335.30 |
| Com'r 10% on $2316.00 | 231.60 |
| Clerk's fees | |

Surveyor Harman for running exterior boundary lines $74.98.

All of which is respectfully submitted.

H. C. AUVIL,
*Com'r of School Lands for McDowell County.*

At a Circuit Court held for the County of McDowell at the Court House thereof, on Wednesday, July 5th, 1882, for the transaction of Chancery Business.

Present: Hon. David E. Johnson, Judge of the 9th Judicial Circuit of West Virginia.

FRIDAY MORNING, 8 O'CLOCK, *July* 7, 1882.

Court met pursuant to adjournment.

Present: The Hon. D. E. Johnston, same Judge as on yesterday.

In the Matter of School Lands.

47 H. C. Auvil, Commissioner of School Lands for this County having reported to the Court that there is a body of waste and unappropriated land containing some 5,000 acres situate in said County on the North Fork of Tug River and South Fork of Elkhorn, and out of which the following sales have been made, but not yet confirmed, to-wit:

John T. Belcher 86 acres, at $6.00, to same 140 acres at $14.00 to same, 100 acre sat $9.00, to H. Harrison 556 acres, at $20.00, to C. W. Straley, I. E. McDonald and J. D. Johnston 148 acres, at $50.00, to same 270 acres at $34.25 to James Damrel 30 acres at $5.00, to which report there are no exceptions. It is, therefore, adjudged, ordered and decreed that the said sales be and they are confirmed. And the said Commissioner Auvil out of the cash payment therefor is directed to pay as far as the same will go, his commissions and the costs of this proceeding and withdraw the bonds for the deferred payments, collect the same and report to Court, and as soon as said purchase money is paid by the parties, said Commissioner Auvil will *will* convey to them by proper deeds the lands so purchased for each of which said deeds said Com'r shall be allowed the sum of $5.00 to be paid by the parties to whom the deed is made, and this matter is referred to John E. Johnson, Com'r in Chancery for this Court with instructions to ascertain and report what quantity of waste and unappropriated lands is in the boundary referred to in Commissioner Auvil's report the location and probable value thereof, and whether any person is in possession of any part thereof, or claiming the same, or any part thereof and the nature of such claim, and all other matters required by law to be reported and make and file such report thirty days proceeding the first day of the next term of this Court.

At a Circuit Court held for the County of McDowell at the court house thereof, Wednesday, April 4th, 1883, for the purpose
48 of transacting Chancery business.

Present: Hon. David E. Johnston, Judge of the Ninth Judicial Circuit of West Virginia.

THURSDAY MORNING, 8 O'CLOCK, *April 5th*, 1883.

Court met pursuant to adjournment.
Same Judge as on yesterday.

H. C. AUVIL, Com'r of School Lands, for McDowell County,
against
A Body of Waste and Unappropriated Lands Containing Some 10,000 Acres.

In the Matter of School Lands.

This cause came on again to be further heard on this the 5th day of April, 1883, upon the papers formerly read and upon the report of Commissioner Auvil of the sale of a portion of said lands lying in McDowell County, under decree of the October term of this Court together with the exhibits filed with said report and the bonds taken at said sale, and it appearing to the Court that advertisement of said sale was duly published and posted as required by law, and be decree of this Court and there being no exceptions to said report and no valid objections appearing thereto and no evidence adduced showing that the same should be set aside. It is adjudged, ordered and de-

cree- that the said report and the sales therein mentioned to the respective purchasers be and the same are hereby confirmd and the said H. C. Auvil, Com'r of School Lands out of the cash payment received by him on the said sales do retain ten per cent commission thereon, pay the costs of this proceeding so far as the same shall go including fees of printer's, clerk's, sheriff's, surveyor's and chainmen, including fee of $20.00 to Com'r Johnson for report and take receipts for such payments returning to this Court at its next term a report, together with receipts for such payments. And it further appearing from said report of said Com'r Auvil that John
49 Effler and Tobias Belcher, became the purchasers of Lot No. 10, lying on Puncheon Camp Branch, etc., at the sum of $15.00 and that J. D. Sergeant became the purchaser of the lots number 20-28-29 and 30 containing in the aggregate 879 acres at the sum of $157.00 and that Wm. S. England became the purchaser of the lot numbered 22, containing 50 acres on Lower Shannon Branch of Tug River at the sum of $15.00; and that Jas. A. Belcher, became the purchaser of the lot numbered 25 containing 170 acres on Turkey Gap Branch of the South Fork of Elkhorn at the sum of $30.00, and that D. H. Harman, Jr., became the purchaser of the lot numbered 34, containing 128 acres on Clear Fork, at the sum of $25.00, and it further appearing from said Com'r Auvil's report that the said purchasers to-wit: John Effler and Tobias Belcher, J. D. Sergeant, Wm. S. England, Jas. A. Belcher and D. H. Harman, Jr., paid the whole amount of the said purchase money respectively, to-wit: $242.00.

It is, therefore, further ordered that said Com'r Auvil convey to said purchasers the land purchased by them respectively, by apt and proper deeds, for which he shall be allowed $5.00 each out of the fund and said Com'r is further directed to retain his commissions, pay costs and pro rata and said commissioner Auvil is further directed to withdraw the bonds herein, collect the same as they respectively fall due, and should any of the purchasers mentioned in said Com'r Auvil's report desire to discharge and pay off their said bonds before they become due said commissioner is authorized to receive the same, and upon such payment said commissioner is further directed to make to the purchasers a proper and apt deed for which he may retain out of the fund $5.00 for each deed so made and report his proceedings to Court and that the said report of sale be spread upon the record of this Court as part of this order.

50 At a Circuit Court held for the County of McDowell, at the *House* House thereof, on Wednesday April 9th, 1884, for the purpose of transacting Chancery business.

Present: Hon. David E. Johnson, Judge.

FRIDAY MORNING, 9 O'CLOCK, *April* 11, 1884.

Court met pursuant to adjournment, same Judge as on yesterday.

In the Matter of School Lands.

On motion of C. W. Straley and James M. French, and upon motion of C. W. Straley and I. E. McDonald and James D. Johnston,

and on motion of I. A. Welch and Wm. H. Herndon and James A. Belcher and Wm. R. Belcher also upon motion of C. W. Straley, H. W. Straley, Wm. A. French and I. A. Welch, they have leave to file their petition- in this cause, which are accordingly filed and on motion of H. C. Auvil he has leave to file his report in this cause which is filed and this cause coming on to be heard upon the papers formerly read herein, upon the petition of C. W. Straley & als. and upon the report of H. C. Auvil, Com'r of School Lands, to which report there are no exceptions *and* was argued by counsel, and upon consideration whereof the Court doth confirm said report; and it appearing to the Court from the petitions of C. W. Straley and others, that the tract- heretofore purchased by C. W. Straley and James M. French at a sale made by the Com'r of School Lands represented to contain 99, 522, 640 and 570 acres by recent and corrected survey have been found to contain 121, 501, 560 and 730, respectively, and that the tracts purchased by C. W. Straley, H. W. Straley, Wm. A. French and I. A. Welch represented to contain 600, 400 and 118 acres by recent corrected survey have been found to contain 1281 and 217 acres respectively;
51 also that the tracts purchased by C. W. Straley, I. E. McDonald and James D. Johnson, represented to contain 480 and 270 acres by recent corrected survey have been found to contain 496 and 398 acres, respectively, that the tracts purchased by I. A. Welch and Wm. H. Herndon represented to contain 88, 100 and 99 acres by recent corrected survey contains, 64, 82 and 106 acres respectively, that the tracts purchased by James A. Belcher represented to contain 170 acres by recent corrected cursey contains 135½ acres, and that the tracts purchased by Wm. R. Belcher represented to contain 100 acres by recent corrected survey contains 113 acres, it is adjudged, ordered and decreed that the Commissioner of School Lands convey the said several tracts to the respective parties entitled thereto by proper deeds in conformity to said recent corrected survey, it appearing to the Court from the report of said Auvil Com'r of School Lands that the purchase money for all of said tracts has been paid in full. And it further appearing to the Court that all of the purchase money due for the tracts of 400, 140, 150 and 230 acres purchased by C. W. Straley and James M. French and tracts Nos. 6 and 7 containing in all 1072 acres purchased by C. W. Straley, I. E. McDonald and W. A. French, has been paid, it is ordered that the Commissioner of School Lands convey said last mentioned tracts to the parties entitled thereto, and it appearing to the Court that the tracts purchased by C. W. Straley and James M. French represented to contain 400, 140, 150, 230, 121, 501, 560 and 730 acres respectively *has* been directed by said C. W. Straley and James M. French to be conveyed to them and Wm. A. French jointly, the Court doth so adjudge, order and decree; and it further appearing to the Court that Wm. H. Herndon has assigned his interest in the tracts of 64, 82 and 106 acres purchased by I. A. Welch and said Herndon to said I. A. Welch, and directed the deed therefor to be made to said I. A. Welch the Court doth so adjudge, order and decree.

52 And it further appearing to the Court that the tract represented to contain 75 acres purchased by James Mullins, by recent corrected survey contains 60 acres, and that purchase money due for said tracts has been paid, The Court doth adjudge, order and decree that the Commissioner of School Lands convey said tract to said Mullins in conformity with said corrected survey.

**In the Matter of School Lands.**

H. C. Auvil, Commissioner of School Lands having this day reported to the Court that he has mad- deeds to C. W. Straley and I. A. Welch and others as directed by order of to-day. It is ordered that said parties to whom the deed- were made have leave to withdraw the same from the papers of this cause and have them recorded in the deed book of this county.

*Report of Waste and Unappropriated Lands.*

Office of Commissioner of School Lands for McDowell County.

JULY 7TH, 1882.

To the Hon. D. E. Johnston, Judge of McDowell Circuit Court:

The petition and report of H. C. Auville, Commissioner of School Lands for the County of McDowell, would respectfully show to your Honor that there is about 5,000 acres of waste and unappropriated lands lying in the said county mostly on the waters of the North Fork of Tug River and partly on the South Fork of Elkhorn and in the neighborhood of "Peeled Chestnuts" containing some 5,000 acres the probable value of which is about 40 cents per acre, and that no one so far as your petitioner knows is in possession of any part thereof, that there has been heretofore sold out of the
53 same which sales have not yet been confirmed, the following parcels purchased *sames have not yet been confirmed, the following parcels purchased* by the following named parties, at the following prices, to-wit:

To John T. Belcher 86 acres at $6.00 to same 140 acres at $14.00, to same 100 acres at $9.00, to H. Harrisson 556 acres at $20.00, to C. W. Straley, I. E. McDonald and J. D. Johnson 480 acres at $50.00, and the same 270 acres at $34.25, and to James Damrel 30 acres *to* $5.00.

Your Commissioner prays that said sales be confirmed and that this matter of "Waste and unappropriated" land be referred to a Commissioner in Chancery of this Court with instructions to ascertain and report the situation, quantity and probable value of said lands whether any person is in possession of any part thereof and all other matters required by law to be reported, and that a sale of said land be directed.

And in duty bound, etc.

H. C. AUVIL,
*Com'r of School Lands for McDowell County.*

Copy.
Teste:
H. C. AUVIL,
*Com'r of School Lands.*

*Report of Com'r Jno. F. Johnson.*

To the Hon. David E. Johnson, Judge of the Circuit Court of McDowell County:

In obedience to an order of said Court made at the July Term last, referring a cause in the matter of School Lands to me, the undersigned, a Commissioner in Chancery for said Court with instructions to ascertain and report what quantity of waste and unappropriated lands is in a boundary referred to in Com'r Auvil's report made at the said last term of this Court, the location and probable value thereof, and whether any person is in possession of any part
54 thereof, or claiming the same or any part thereof and the nature of such claim, and all other matters required by law to be reported and make and file such report 30 days preceding the first day of the next term of this Court.

Your Commissioner begs leave to report, 1st, the quantity of land in said boundary, mentioned in said Auvil's report, as is ascertained by a survey made of said boundary by D. H. Harman, is 23,866 acres a plat of which is herewith filed as part of this report marked "A;" 2nd. The location of which is Elkhorn, Tug and tributaries. 3d: The probable value of which is 75¢ per acre, 4th. There are about 37 different persons claiming title to portions of said boundary of land under grants from the Commonwealth of Virginia and State of West Virginia, amounting in the aggregate to about 10,677 acres; that said parties are in possession of said land; that the names of said claimants and number of acres, — each of their claims are herewith filed as part of this report marked "B;" that after deducting the amount of land claimed and in possession of the said parties — amounts to 13,189 acres of waste and unappropriated land.

Your Commissioner further reports that there has been sold by the Com'r of School Lands of McDowell County out of said 12,189 acres the following tracts of land, to-wit:

To J. T. Belcher 86, 140 and 100 acres, to Henry Harrison 556 acres, to Straley, French and McDonald 480 and 270 acres, and to James Damrel, 30 acres which sales have been confirmed, making in the aggregate 1662 acres of said 13,189 sold and leaving 11,527 acres yet to dispose of.

Your Commissioner would further specially report that there is a tract of land amounting to 1089 acres now claimed by Joseph I. Doran, Jno. A. Bailey and J. M. Stamper, which land as I have understood was surveyed a number of years ago by one Osborn, but was never carried into grant and said Osborn on the 1st day of October 1868 conveyed the said land to said J. A. Bailey and
55 had the same recorded on the 23rd day of November, 1877, and on the 20th day of October, 1877, the said Bailey conveyed the same to W. T. Moore of Tazewell County, Virginia, and recorded November 23rd, 1877, and since that time the said Moore has conveyed the same to the said James M. Stamper and Jno. A. Bailey and Joseph I. Doran, that the same was never placed on the land books until the year 1877, since which time the taxes *has* been

regularly paid, and your commissioner not being advised as to the validity of said claim has treated the same as waste and unappropriated land and respectfully refers the same to your Honor for instructions, or to pass (yourself) upon whether the same is waste and unappropriated land or otherwise.

All of which is respectfully submitted,

JNO. F. JOHNSON,
*Com'r in Chancery McDowell Circuit Court.*

Copy.
Teste:
H. C. AUVIL,
*Com'r School Lands.*

In the Matter of School Lands.

*Decree of Sale of Waste and Unappropriated Lands.*

Jno. F. Johnson, one of the Commissioners in Chancery of this Court, to whom was referred at the last term of this Court the question of the title and boundary of a tract or body of land situate in the county — on the waters of Elkhorn and on the North Fork of Tug River, said to be waste and unappropriated, having on the 4th day of October, 1882, filed his report showing that there — situate on the waters aforesaid a body of some 23,866 acres of waste and unappropriated land, less about 14,000 acres claimed and owned by persons whose titles are protected by the Constitution and Laws of the State and that said residue, to-wit: about 9,000 acres *are* subject to sale as school lands with the modifications hereinafter con-
56 tained, said report is confirmed. It is therefore adjudged, ordered and decreed that School Com'r H. C. Auvil, proceed to have laid off as far as practicable into tracts or blocks of 1,000 acres each said 9,000 acres of land, and it appearing to the Court that there are within said boundary of 23,866 acres the following tracts belonging to persons, whose titles are protected as aforesaid, to-wit: J. W. L. Bailey, 50 acres, Zach Bailey, Sr., 86 acres and 50 acres, John A. Bailey 100 and 120 acres, D. G. Sayers 40 and 70 acres, John A. Belcher 41, 150, 184 and 50 acres, Herndon Cline 64 acres, Thomas H. Franklin, 477¼ and 232 acres, John A. Harman 250 acres, Henry Harrison 321 and 556 acres, W. B. and B. W. V. Harman 426 and 250 acres, Jacob M. Hammond 50 acres, W. L. Harman 110 acres, John Jeffra, 440, 340 and 145 acres, Geo. W. Lambert, 115 acres, James Mullins, 92 and 86 —, Isaac Lambert 205 acres, Addison Milam 140 acres, Wm. L. Moore 24, 380, 29, 108 and 1089 acres, the latter tract now owned by Joseph I. Doran, John A. Bailey and James M. Ctampier; Wiley Osborn's heirs 336 —, Jesse Osborn's heirs 12 acres, John O. and Adaline Perdue 128 acres, Samuel Plummer 166 acres, Geo. P. Smith 312 acres, Hall and Chapman 637½ acres, —— Johnston 212½ acres, Jas. Shields 162 acres, D. G. Sayers, 982 acres, James A. Tiller 90 and 81 acres, Sam'l L. Tabor 883 acres, E. F. Totten 126 acres, Lewis Terry 42, 100 and 190 acres, Wm. L. Taylor 145, 92 and 5 acres, Calvin Taylor 76 and

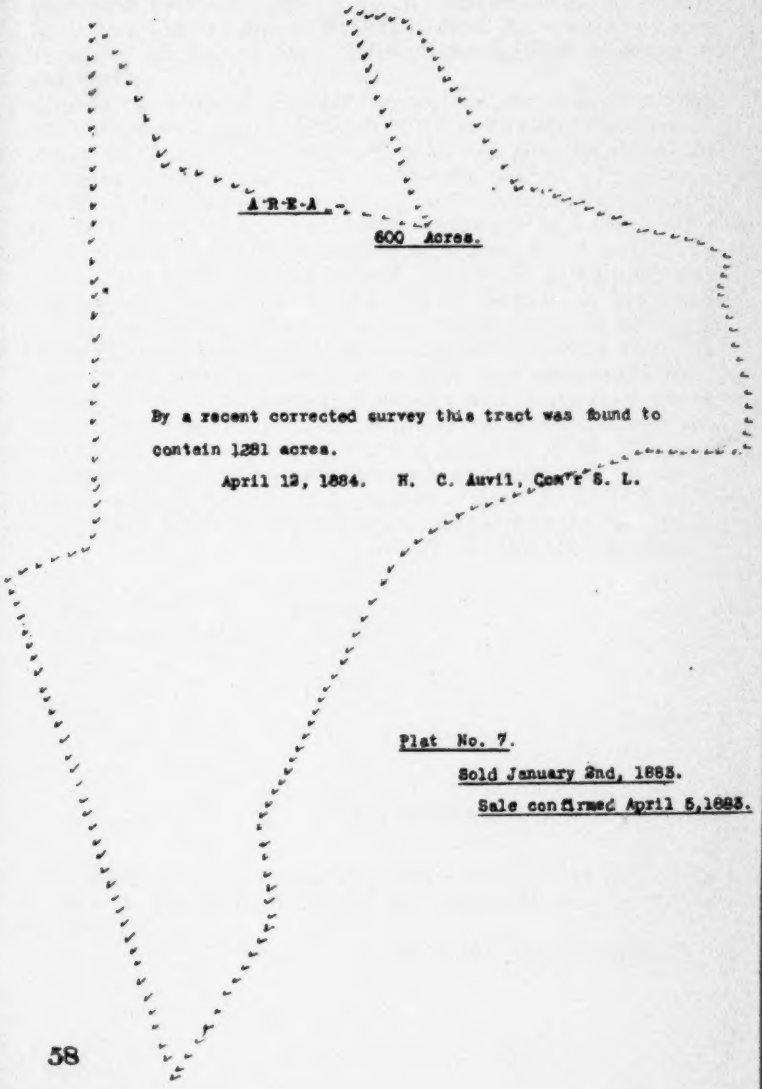
124 acres, Bolinda Johnson 90 acres, Sam'l W. Williams 107 and 226 acres, Joseph Terry 30 acres, Hiram Christian 107 —, John T. Belcher 86, 14 and 100 acres, C. W. Straley, I. E. McDonald and J. D. Johnston, 480 and 270 acres and James Damrel 30 acres, Hiram Christian 206 acres and 410 acres and John W. Taylor 285 acres. *And* it is further ordered that if there are any other persons who own or claim lands within the boundary of the said 23,866 acres, whose titles are protected aforesaid, and whose names are not herein specifically mentioned, their said titles and claims are hereby intended to be exempt as well as those herein mentioned
57 from sale as school lands, and as to those hereinbefore mentioned, if there *by* any mis-description as to the quantity mentioned belonging to each individual named, this order is intended and is declared and does embrace the proper quantities belonging to each person named.

It is further ordered that Commissioner Auvil as to the waste and unappropriated land aforesaid so soon as the same can be surveyed and laid off as hereinbefore directed shall advertise and proceed to sell upon the time, terms and mode prescribed by law, and report to Court.

Copy.
Teste:

H. C. AUVIL,
*Com'r School Lands.*

(Here follows Plat No. 7 and Survey marked p. 58.)



A·R·E·A.

600 Acres.

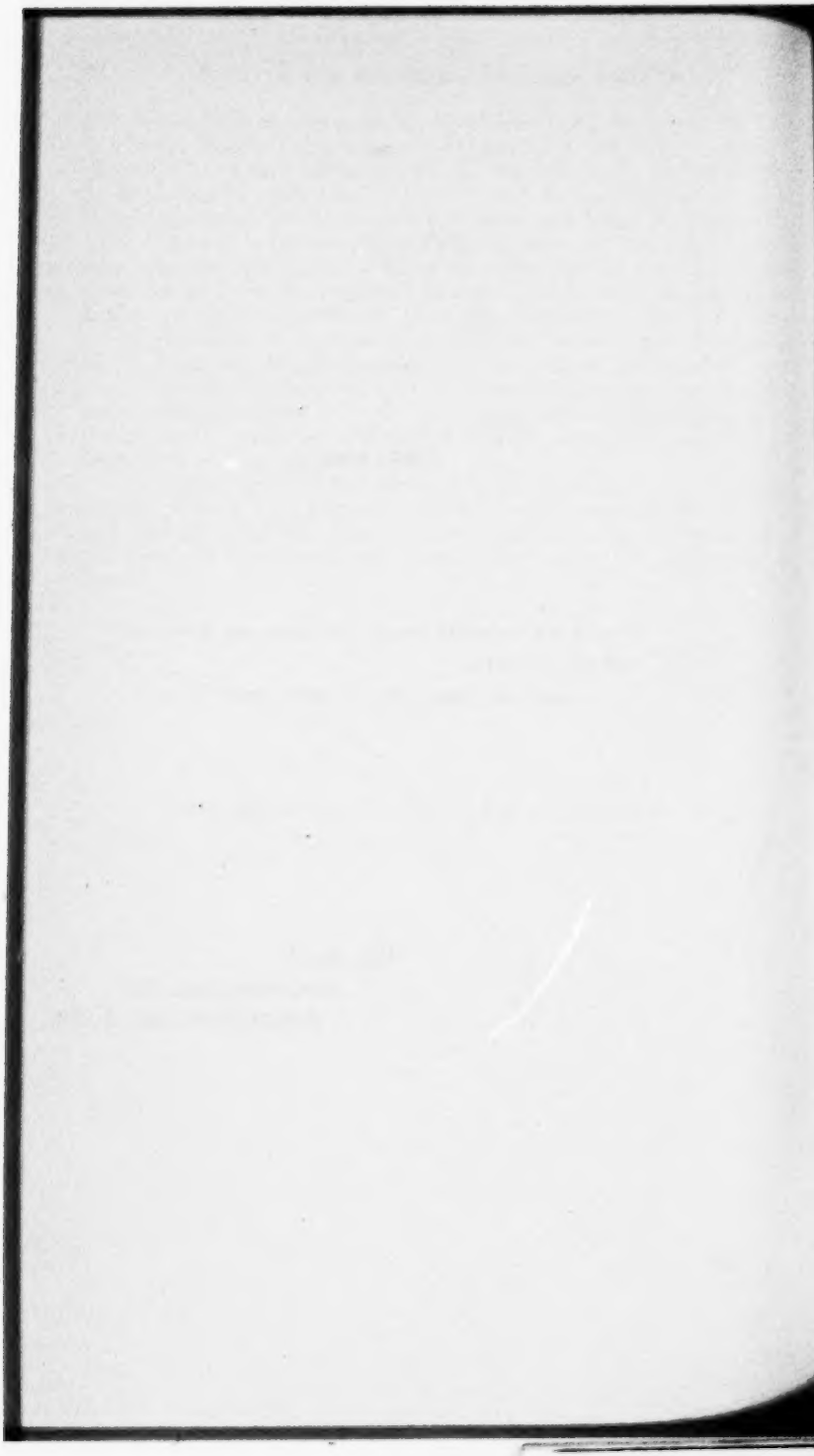
By a recent corrected survey this tract was found to contain 1281 acres.

April 12, 1884. H. C. Auvil, Com'r S. L.

Plat No. 7.

Sold January 2nd, 1883.

Sale confirmed April 5,1883.



DARK PAGE BLE

59 Plat and courses of 600 acres of waste and unappropriated land, lying in McDowell County, West Va., on the South Fork of Elkhorn, John Knob and Rooting Camp Branches of same, which was sold as School Land on the 2nd day of January, 1883, and purchased by C. W. Straley, H. W. Straley, Wm. A. French and I. A. Welch at the sum of $130.00. And the sale thereof confirmed on the 5th day of April, 1883. Bounded and described as follows, to-wit:

Beginning at a white oak and chestnut on the side of a ridge corner of 184 acres of Jas. A. Belcher, N. 69 E. 60 poles to a chestnut and Ironwood on a cliff, S. 79 E. 180 poles to a gum, chestnut and poplar on the side of a ridge, S. 52 E. 38 poles to a spruce pine on a spur S. 35 E. 134 poles to a locust and white oak on the side of a ridge S. 13 E. 60 poles to a spruce pine on the side of a spur near a corner of 50 acres of said Belcher and with the reverse of same N. 77 E. 34 poles to a black oak and two red oaks, N. 58 E. 66 poles to a chestnut on the side of a ridge, N. 82½ E. 20 poles to two small black oaks and hic*h*ory corner of same and also corner of 350 acres of George Harman, leaving the former and with the latter N. ½ E. 138 poles to a hickory and maple on a spur near the edge of John Knob Flat, N. 40 W. 60 poles to a hic*h*ory and chestnut on top of the Buzzard Nest spur N. 68¾ E. 124 poles to a chestnut, wahoo and sourwood on the point of a spur, leaving same, N. 10 W. 190 poles to a cucumber, chestnut and chestnut oak and black oak on top of Clayborne ridge S. 70½ W. 335 poles to a stake N. 15½ W. 150 poles to a stake, S. 50 W. 200 poles east 200 poles to the beginning.

D. H. HARMAN, *Surveyor.*

| | |
|---|---|
| Fee ..... | $14.60 |
| Chainman & Marker. | 3.00 |
| | 17.60 |

Copy.
Teste:

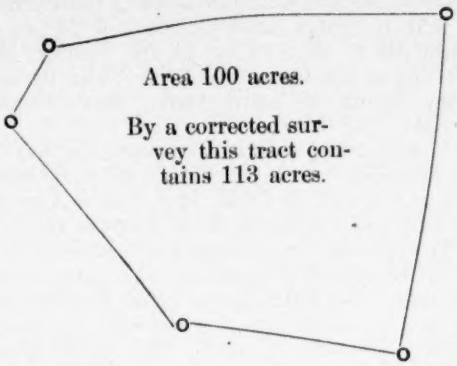
H. C. AUVIL,
*Commissioner of School Lands.*

60 Deed to the foregoing described 1281 acres of land made to I. A. Welch, C. W. Straley and others, on the 11th day of April, 1884.

H. C. AUVIL, *Com'r S. L.*

ED THRU

Plat No. 15.




Sold January 2nd, 1883.

Plat and courses of 100 acres of waste and unappropriated land lying in McDowell County, West Virginia, on the Rooting Camp Branch of the South Fork of Elkhorn Creek, which was sold as School Land on the 2nd day of January, 1883, and purchased by William Belcher at the sum of $20. And the sale thereof confirmed on the 5th day of April, 1883, Bounded as follows: to-wit:

Beginning at a chestnut oak and chestnut on top of Clayborn ridge S. 55 E. 24 poles to a cucumber, chestnut and chestnut oak in the Maitland line about 2 poles from top of said ridge on the east side thereof S. 32½ E. 200 poles to a stake in said line leaving same West 210 poles to a stake, north 140 poles N. 45 E. 170 poles to the beginning.

D. H. HARMAN, *Surveyor.*

| | |
|---|---|
| Fee ..... | $5.22 |
| Chainman and marker. | 3.00 |
| | 8.22 |

May 31-1883.

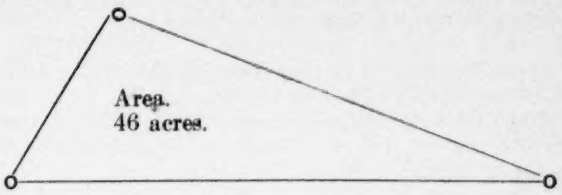
61 A copy.
Teste:

H. C. AUVIL,
*Com'r School Lands.*

Deed to the foregoing described 113 acres of land made to Wm. R. Belcher, on the 12th day of April, 1884.

H. C. AUVIL, *Com'r S. L.*

Plat No. 16.




Sold January 2nd, 1883.

Plat and courses of 46 acres of waste and unappropriated land lying in McDowell County, West Va., on John Knob Branch of Elkhorn adjoining the Maitland Survey and 350 acres of George Harman, which (said 46 acres) was sold as School Land on the 2nd day of January, 1883, and purchased by J. W. Harman at the sum of $10.00. And the sale thereof confirmed on the 5th day of April, 1883. Bounded as follows, to-wit:

Beginning at a cucumber, chestnut and chestnut oak in Maitland line and with it S. 32½ E. 240 poles to a stake in the line of said 350 acres S. 89 W. 75 poles to two chestnuts, sourwood and poplar on a spur, N. 10 W. 190 poles to the beginning.

D. H. HARMAN, *Surveyor.*

| | |
|---|---|
| Fee ..... | $4.02 |
| Chainman and marker. | 3.00 |
| | 7.02 |

May 31, 1883.

62 Copy.
Teste:

H. C. AUVIL,
*Commissioner of School Lands.*

Deed to the foregoing described 46 acres of land made to J. W. Harman on the 2nd day of June, 1885.

H. C. AUVIL,
*Com'r S. L.*

STATE OF WEST VIRGINIA,
*County of McDowell, ss:*

I, W. Burbridge Payne, Clerk of the Circuit Court of McDowell County, do hereby certify that the foregoing writing *is* true and correct copies from the records of my office, as the same exist therein.

Given under my hand and seal of said Court, at Welch, this 29th day of May, 1906.

[SEAL.] W. BURBRIDGE PAYNE, *Clerk.*

6—165

(Endorsed:) Eliza T. Fay et al. vs. Samuel A. Crozer et al. In Ejectment. "104." (11.49 Clerk's Fes.) Filed in Open Court this 13th Nov., 1906. Edwin M. Keatley, Clerk.

And at another day, to-wit, on the 12th day of September, A. D. 1907, there was filed in the Clerk's office of said Court the opinion of the Hon. Alton G. Dayton, District Judge sitting specially for the determination of this case, which said opinion is in the words and figures as follows:

63 In the Circuit Court of the United States for the Southern District of West Virginia.

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER et al.

In Ejectment.

Price, Smith, Spilman & Clay, Attorneys for Plaintiffs.
Brown, Jackson & Knight, D. J. Strother and W. W. Hughes, Attorneys for Defendants.

*Opinion by Dayton, District Judge (Sitting Specially).*

64 WILLIAM FAY and ELIZA T. FAY, His Wife,
v.
SAMUEL A. CROZER, JOHN P. CROZER, MARY CROZER PAGE, Trustees of the Crozer Land Association, et al.

In Ejectment.

Declaration in ejectment in this action was filed in this court at April Rules, 1901, an order of survey subsequently directed and on November 13, 1906, in open Court, a stipulation was filed by counsel representing the plaintiff and the trustees of the Crozer Land Association, the Houston Coal & Coke Company and the Turkey Gap Coal and Coke Company, whereby it was agreed that the action should be tried at that term as to said parties and as to the undivided half interest claimed by plaintiffs in a certain portion of the land in controversy, fully identified by reference to the surveyor's map filed: that such trial should be by the court in lieu of trial by jury, with like effect as if tried by a jury and judgment rendered by instruction of the court to find for the prevailing party, with all right of appeal or writ of error in all respects preserved to the losing party. And thereupon said stipulation set forth an agreed statement of facts upon which trial should be had which agreed statement of facts was made part of the record and the case was, to the extent and between the parties indicated, submitted. These agreed facts somewhat condensed are as follows:

On January 3d, 1860, the commonwealth of Virginia granted to the plaintiff Eliza T. Fay and Samuel W. Austin by patent, a tract of 1200 acres of land, situate in McDowell county, West Virginia. At the time this grant was made and ever since to the present time Eliza T. Fay was under coverture being the wife of the plaintiff William Fay. No part of said land so granted was ever sold by plaintiffs nor any interest therein. This 1200 acre tract was entered for taxation for the year 1865 in the names of Eliza
65 Fay and E. F. Harman and for the years 1866 and 1867 in the names of Eliza Fay and E. F. Harman and for the years 1868 and 1869 in the names of Eli Fay and E. H. Harman. These years are the only ones, from the date of the patent to the present time, in which this tract was so on the land books for taxation and no taxes were ever paid on it by the grantees in said patent. In October, 1869, the sheriff of McDowell county sold this 1200 acre tract returned delinquent in the names of Eli Fay and E. F. Harman for the non-payment of taxes for the years 1865 and 1866 and at the same sale sold it as delinquent in the same names for the non-payment of taxes for the years 1867 and 1868. At both sales the State of West Virginia became the purchaser and no redemption thereof has ever been made by Mrs. Fay or Harman, her co-tenant.

The trustees of the Crozer Land Association claim legal title to the larger part of the 1200 acres in this way: Henry C. Auvil, Commissioner of School Lands for that county, on July 7th, 1882, reported a tract of 5000 acres (which included all the land involved, under the stipulation, in this trial) as waste and unappropriated. Upon his report the Circuit Court of McDowell county entered a decree directing him to sell this 5000 acres, after first directing its subdivision into smaller tracts. He did sell *inter alia,* 46 acres to J. W. Harman, 113 acres to William R. Belcher and 1281 acres to Straley, French and Welch. These sales were confirmed, deeds were directed to be executed and were executed and delivered by said Auvil, Commissioner, to said purchasers.

These three tracts cover the land of the 1200 acre tract involved in this trial under the stipulation. Fay and wife were in no way parties to the proceedings by which these three tracts were sold by Auvil, commissioner, as waste and unappropriated lands.
66 These three tracts of 46, 113 and 1281 acres by subsequent conveyances passed and vested for value in the defendant trustees of the Crozer Land Association and from 1884 down to the present time have been substantially assessed for taxation and never returned delinquent, in the names of said land association and Harman, and such taxes assessed have been paid.

These three tracts of 46, 113 and 1281 were conveyed by Harman, Belcher and Straley, French and Welch to Samuel A. Crozer, who subsequently conveyed them to the trustees of the Crozer Land Association. While they were held by Samuel A. Crozer, he by deed of lease, dated December 12, 1887, leased a part to the Turkey Gap Coal & Coke Company, the property lines of which leasehold embrace the eastern portion of the land in controversy in this trial, and by a similar deed dated December 16, 1887, he leased to the Houston

Coal & Coke Company a part which adjoined the former lease and embraced the western portion of the land in controversy in this trial. Said Lessees went into immediate possession under their respective leases for the purposes thereof and such possession has remained uninterrupted to the present time.

The acts of possession of these leases consist of developing and operating large and expensive coal and coke operations. On the exact land here in controversy, two dwelling houses and a ventilating fan have been erected and used since 1894 or 1895, coal headings or entries under surface have been driven by the Turkey Gap Coal & Coke Company. Timber has been cut since 1887 for mine purposes and coal has been mined since 1893, under adverse claim of title.

DAYTON, District Judge, (sitting specially) after stating the facts as above.

The clean cut issue in this case is whether the title of Mrs. Fay to the land in controversy has been forfeited either by sale to
67 the state, or for non-entry for taxation on the land books.

This being an action of ejectment in which the stouchstone principle is that the plaintiff can only recover upon the strength of his own title and not upon the weakness of his adversary's, if such forfeiture has accrued, it becomes absolutely immaterial as to how the defendants hold.

At the threshold I am compelled to express my admiration for the earnestness, thoroughness, learning and ability displayed by counsel on both sides in discussing orally and in briefs this issue, involving, as it does, some of the most difficult and perplexing questions that have confronted our courts during more than a century, in construing the land law system of Virginia and West Virginia.

These propositions, quoted from brief of counsel for plaintiff, I think clearly set forth the reasons claimed by defendants for their claim of forfeiture:

1. Because this land was not entered upon the proper land books of Virginia and West Virginia for taxation for the five successive years of 1860 to 1864 both inclusive.

2. Because it was sold in October, 1869, by the sheriff of McDowell county for the non-payment of taxes assessed thereon in the names of Fay and Harman, for the years 1865-6-7-8 and purchased by the State of West Virginia and was not redeemed within one year after sale.

3. Because said land was omitted from the land books of McDowell county for the year 1870 and subsequent years, in the name of Fay and Harman, and has thereby become forfeited for non-entry for five successive years since 1870.

To meet the first two propositions counsel for plaintiff have ably argued—First.—That no forfeiture, under the law providing that omission for five successive years from the land books should
68 work such, in fact accrued prior to 1865, because secs. 6 and 10 of Chap. 35 of the Code of Virginia, 1860, required the Clerk of the County Court of each county to certify to the assessor

for entry on the land books a list of all deeds, conveyances, and an abstract of all grants from the land office recorded within the year ending on the 31st day of December proceeding in his county, and inasmuch as this patent bore date January 3, 1860, it was not to be certified for entry on the land books for that year as not having been recorded "within the year ending on the 31st day of December preceding." Second.—That the sale of the land for non-payment of taxes by the sheriff to the State in October, 1869, was void for defects apparent on the face of the record thereof such as that the recorder failed to note on the lists of sales the day the sheriff returned these to his office: that the form of affidavit of the sheriff attached to such lists is not dated; and that the certificate of the sheriff was not signed by the sheriff.

I am inclined to hold both of these positions to be correct. In other words, although there may be and has been question as to the first, that the land under the law then in force depended upon the certificate by the clerk of the grant to the assessor for assessment and could not be required to be placed on the books for 1860 whereby no forfeiture had accrued prior to 1865, yet I am inclined to concede this to be true and as to the second proposition that the sheriff's sales in 1869 were voidable for irregularities on the face of the records thereof I think there can be no doubt under the rulings in such cases as,

Barton v. Gilchrist 19 W. Va. 223.
Simpson v. Edmiston 23 W. Va. 675.
McAllister v. Cottrille 24 W. Va. 174.

69 It is true that under the socalled curative sec. 25 of Chap. 31 of the Code of 1899, these defects could no longer be relied on but it has been expressly determined that this section is not retroactive and therefore does not "cure" defects in prior sales.

State v. Harman 57 W. Va. 447.

To meet the third proposition of defense the argument of counsel for plaintiff may be reduced to these propositions: The land not having been forfeited legally either for non entry or by *valid* sale to the state for non-payment of taxes prior to 1870, under and by virtue of section 19, Chap. 118, Acts of W. Va. 1863, which provides "real estate purchased in for the State at a sale for taxes shall not thereafter be entered in said books, but the Auditor shall keep a register thereof," was properly omitted from the books under the void sale in 1869 to the state and was not subject to forfeiture because of such omission; that in 1882 in the proceeding by the commissioner of school lands, the state, by the attempted sale to the defendant's grantors, collected all the taxes which had been charged against said lands up to that time, in other words, all taxes due per up to 1884; that since that sale the purchasers and their alienees have paid all taxes since assessed; that this sale by the school commissioner in 1882 was absolutely null and void, (*a*) because Mrs. Fay and the former owners were not made parties to the proceeding which was one against waste and unappropriated and not delinquent and forfeited land; (*b*) because the land

had never become forfeited to the state, the state therefore had no title to sell and the school commissioner had no power to sell land other than that to which the state had title and his sale was void as to the real owner. The conclusion reached is that the state
70 has been paid her taxes, no forfeiture has accrued, the land belongs to Mrs. Fay and the defendants can only claim a lien or quasi lien upon it for the taxes paid since their purchase.

The practical effect of this conclusion is a little startling at least for it holds this woman to have good title although for forty-seven years she has not paid a cent of taxes and, logically, could still have the same good title a century hence, if she cared to allow matters to remain *in statu quo*. This, too, in the teeth of a century of very numerous determined and positive constitutional and legislative enactments to compel payment by land owners of the taxes due from them.

"The reason of the law is the life of the law" and it is almost impossible to intelligently consider the complications arising here without to come extent considering the policy of the law running through the land legislation of the two Virginians. This legislation is both perplexing and in some particulars incongruous. It has caused many difficult questions and controversies to spring up and the decisions of the different courts passing thereon have not been by any means always uniform and harmonious. Fortunately for me able counsel for the defense have so clearly in a brief filed set forth the reason of the law and its policy I can do no better than to adopt and quote freely therefrom.

"The Commonwealth of Virginia during the Revolution, with a plentitude of land and an empty treasury, with small resources for revenue (for her own lands paid no taxes into the treasury), to provide a "subject" for taxation, and further to interpose a barrier of outlying settlements between the tempting plantations of the "tidewater" and the marauding Indians to the west, decided to put her lands on the market, and did so,—the price theretofore had been two dollars per acre. But it being soon found that the well-
71 to-do to the east were unwilling to leave their comfortable homes to literally risk their scalps, and that the old price was prohibitory to the adventurers, brave fellows who lives by their rifles and whose income was limited to the proceeds from their pelts, a broader statesmanship conceived the plan of marketing the state's land at a nominal price (two cents per acre), but penny-wise, adopted as the way for it that involving least possible expense to her. This plan, like all "cheap jobs," to an incalculable degree proved calamitous, with duplicate, triplicate and quadruplicate titles and boundary disputes without limit. Wherefore, an absolute necessity arose for a forfeiting *sustem*, with an end in view of more vital importance to the Commonwealth than any mere matter of revenue:—the settling of her land titles and the security of her citizens in their homes, protection for those who opened up the wilderness, tilled the soil and supported the state.

"In the beginning when on revenue bent, there was established the land office, where whosoever would might buy to the limit of

his means at two cents per acre as many acres of the state's lands as he chose, to be located at his pleasure and without supervision or restriction except that there be somewhere on the public domain. The entry was required to be surveyed at the purchaser's own cost under his own direction, and the "grant" followed without inquiry as to whether of the "state's lands" or some other. "West of the Alleghenies" was then a mountain fastness, full of "savage beasts and still more savage men"; wherefore the market still remained dull, for want of settlers willing to face the risks in advance of protection. So at the instance of speculators, the notorious "inclusive grants" were authorized whereunder blanket surveys of immense acreage at minimum cost were, during the few years of their authorization, spread over the whole southwest country many deep,
72 and by descriptions too indefinite and general to give to the subsequent bona fide settler information as to the location. As result, in time, as the home-makers by degrees pushed out into the wilds with their small "improvements," locating here and there, giving value where none was before, they began to find themselves confronted with the blanket surveys long lain dormant quietly awaiting their coming, only to appropriate the results of these labors and at the ripe moment to gather them in. When the awakening came, it was found the owners of the "Big Surveys" as a rule had eluded taxation; refusing to pay when assessed, but more frequently avoiding even assessment; in either case, withholding tribute to the government whose protection they demanded, leaving the whole burden to the actual settler whose cow or mule was in touch of the tythe-gatherer. As the situation developed, it was made more and more manifest how unjust, grossly inequitable, it was, that the law-obeying citizens who developed the country and have to it its value, who had borne the expense of the government and responded to its call for service civil and military, who had hazarded the savages and subdued the wilderness, should be driven from under the gourd vines of their planting and denied the fruit of their own fig trees, at the instance of those who had shirked every obligation express or implied. Such were the conditions which originated the "system."

"The system" so called, was founded upon the universally accepted principle that every land grant by the state is upon the implied condition that the grantee takes subject to a charge in favor of the state for a just proportion of the cost of the maintenance of government, and that his tenure is subject to full, prompt, and faithful observance of his obligation. The poll tax and civil and military services are the measure of the citizen's personal obligation. The property tax is the incident to ownership—to the right of a
73 continual holding; its prompt payment, the condition absolute upon which the patentee received and accepted the property from the Commonwealth, and upon which he and those under him may enjoy its use. Upon breach of this obligation, the right of the state is instant to resume its own at its pleasure.

For full and interesting statement of the above conditions and the causes, see Hutchinson on Land Titles, pp. 1 & 2. We may be pardoned for a brief quotation:

"The result of this loose, cheap and unguarded system of disposing of public lands, was, that in less than twenty years after the adoption of the system nearly all of them were granted; the most part to mere adventurers, in large tracts or bodies, containing not only thousands, but in many cases hundreds of thousands of acres in one tract.

"Often the grantees were non-residents, and few of them ever saw their lands or expected to improve or use them for purposes other than speculation. The entries and surveys under warrants so cheaply and easily obtained were often made without reference to prior grants, thus creating interlocks, thereby covering land previously granted, so that in many instances the same land was granted to two or more different persons. Sometimes upon one survey actually located others were laid down by protraction—constructed on paper by the surveyors, without ever going upon the lands, thus creating on paper blocks of surveys containing thousands of acres, none of which were ever surveyed or identified by any marks or natural monuments.

"Thus while the state was rapidly disposing of her large domain at two cents per acre, it was not attaining the main objects in view—the settlement of the country and revenue from the owners of lands.

74 "It was found that the grantees not only failed to settle upon and improve their lands, but in most instances they wholly neglected to pay the taxes due thereon, whereby revenue failed and the improvement of the territory was embarrassed and retarded. Non-occupation of the lands and non-residence of the owners made a resort to the lands themselves the only fund for delinquent taxes."

With the conditions and the reason such for the exercise of the right, the General Assembly of Virginia provided, first, for a sale by the sheriff for non-payment of taxes, by a series of acts from 1781 to 1791; when, finding this to fail of the main purpose, it followed with provision for forfeiture for the non-payment. This too, after experience proving short of the needs because of the persistent neglect and refusal of many especially non-residents to have their lands entered for taxation, in 1810 provision was made for forfeiture for non-entry. Of this Mr. Hutchinson says:

"We have seen that, so far, the policy of the state referred to the subject of lands delinquent for the non-payment of taxes. Another class of cases was now discovered requiring strong measures."

In the preamble of the act of Feb. 5, 1810, is recited:

"It being represented to the General Assembly that many persons omit to enter their lands on the commissioner's books, and thereby elude the payment of any revenue tax thereon" etc.

Wherefore, it was thereupon enacted that lands not "Entered" within eighteen months next thereafter should be forfeited. This act was moulded and remoulded in varying form, and finally for the time being repealed February 9, 1814.

On April 1, 1831, the policy and prime purpose of the system,

theretofore often alluded to in the several acts, was in plan terms expressly declared (pp. 8):

75 "And whereas, it is known to the General Assembly that in many cases lands, or parts or parcels of lands (especially such as have been granted and appropriated under the act passed at the May session, in the year 1779, entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands,' and the subsequent acts on the same subject), which have heretofore been or may hereafter be returned delinquent for non-payment of taxes, and which have been heretofore vested by law in the president and directors of the Literary Fund, or which by the provisions of this act shall, or may hereafter be, forfeited and vested in the said president and directors, are held by persons other than those for whose default they have been or shall be so forfeited, claiming bona fide, mediately or immediately, under grants from the commonwealth; and that the said actual holders and bona fide claimants have settled and improved the lands so by them held and claimed, and have, moreover, paid all the public taxes thereon due and charged or justly charged to them; and it is therefore reasonable and just that the titles of such actual holdings and bona fide claimants should be quieted and perfected, so far as the transfer to them of the rights vested in the said president and directors and therefore subject to the disposition of the General Assembly, can accomplish that object: Be it, therefore, further enacted," etc.

The act of Feb. 27, 1835, restored the provision for forfeiture for non-entry, paragraph 2, prefacing the enacting clause with a recital of the occasion for it:

"And whereas, it is known to the General Assembly that many large tracts of land lying west of the Allegheny mountains which were granted by the commonwealth before the first day of April, 1831, never were, or have not been for many years last past, entered on the books of the commissioners of the revenue where they

76 respectively lie; by reason whereof no forfeiture for the non-payment of taxes was *occurred,* or can accrue, under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed for remedy whereof, * * *

"Be it further enacted, That all right, title and interest which may hereafter be vested in the commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred to and absolutely vested in any and every person or persons, other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable, bona fide claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the first day of April 1831, who shall have discharged all taxes duly assessed and charged against him, her or them upon such lands," etc.

Next followed the acts of 1837, 1841, 1842, 1844 and 1846 reiterating the above, and whereunder the state disposed of those of the lands so acquired not by operation of law transferred to junior bona

fide claimants; and, in emphasis of the absoluteness of the transfer of title by such forfeiture, the General Assembly by act (1838) vested directly in Peter Dumas the "Swann" title to over 2,200,000 acres of forfeited lands—not by way of release to the "former owner," but by "transfer to" Dumas, theretofore a total stranger to the title.

By the act of April 12 1852, the forfeiture and vesture of title in the adverse claimant, was again reiterated; and lands forfeited for non-entry, not so transferred to claimants, were made open
77 to entry, survey and grant; and so too the acts of March 20, 1858, and see Code 1849 and 1860, Ch. 114. By this act of 1852 express provision was made whereby the claimant might, should *be* desire an adjudication, file his petition in the circuit court and have his right determined, and so absolute was considered the forfeiture that, while the prosecuting attorney and auditor were required to be parties, the former owners were not, though required to be named in the petition so far as known.

The foregoing statutes were often under consideration by the Court of Appeals of Virginia and of this state, and have always been sustained; and the forfeiture, held to be absolute and complete upon the failure to enter the lands and pay the taxes due and damages accrued. No requisition or judicial proceeding or finding of any kind was required to consummate the forfeiture.

Staats v. Board, 10 Grat. 400;
Hall v. Branscum, 10 Grat. 418;
Wild's Lessee v. Serpell, 10 Grat. 405;
Smith v. Chapman, 10 Grat. 469;
Levasser v. Washburn, 11 Grat. 572;
Atkins v. Lewis, 14 Grat. 30.

Also by the Supreme Court of the United States, approving the foregoing cases, i. e.:

"Forfeiture in such case became absolute and complete by the failure to enter and pay the taxes on the land and the damages in the manner therein prescribed, and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such a forfeiture." Armstrong v. Merrill, 14 Wal. 120.

"The evils so sought to be remedied were peculiarly rank west of the Alleghenies; and as the omitted, speculative surveys were in large degree held by the wealthy in the east, and the occu-
78 pants (those needing protection) lived west of the mountains, the stronger east withdrew the protection of the beneficient act — part of the tyrannous treatment which ultimately resulted in the division of the state.

"So soon as West Virginia became a state the people, mindful of this as well as of other grievances suffered at the hands of a General Assembly dominated by hostile interests, in their first constitution, first abolished the land office and its attendent evils, then adopted drastic measures for the future after due warning given and a day of grace; having first, in token of the "jubilee year," exonerated all lands owing $20 and under and all omitted lands of 1000 acres or less, and further extended to all others as matter of favor, not "right,"

five years for entry, assessment and redemption. Promptly, at the expiration of the five years so allowed, the legislature proceeded to act (1869, Ch. 125 par. 7), reviving all the remedial features of the earlier acts and adding thereto. See Code 1868, Ch. 31, para. 34:

"It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the state taxes thereon not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, not released, paid, or in any manner discharged, *with* were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have, for five successive years, been charged on such books with such taxes on such real estate, the same, and all the title, right and interest of the owner, legal and equitable, thereto, shall, without any proceeding, be absolutely forfeited to and vested in this state; provided, however, that such owner may, within one year after the passage of this act, cause such real estate
79 to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for such years."

"All the estate, title, right and interest which has vested or shall vest in this state, or become irredeemable under the provisions of this chapter, shall be transferred to and vested in any person (other than those for whose default the same may have been returned delinquent or forfeited, their heirs or devisees), for so much thereof as such person may have title or claim to," etc.

"All the real estate forfeited as aforesaid, and not so transferred and vested, shall be sold for the benefit of the school fund."

It will be seen that by this act not only no "redemption" was provided for, but, in terms expressly inhibited by the imperative "shall be sold;" and further that, while the former acts were limited to omissions prior to 1832, this included all, past and future.

By the act of February 27, 1871, the time of one year for redemption was extended to two years from the passage of that act, subject to provision that no such redemption should impair any title transferred by law to any other person under the act of 1869. In 1872 so strongly was the importance of this provision impressed upon the people, and so vivid their experience with the legislature of the old state, jogged by the warning contained in the act of 1871, that, to avoid further extensions and tamperings at the instance of influence and importunity, the people in even stronger language carried the "forfeiture clause" into the constitution itself, together with the transfer of the forfeiture title to the occupant tax-payer; and, in almost identical language with the foregoing. Art. XIII, para. 6:

80 "It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with state tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vested in the state * * * And any owner of land so forfeited, or of any interest therein at the time of

the forfeiture thereof who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land or such interest charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land, or interest therein; provided, such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited."

And by paragraph 3 of this Article, it was provided that all titles vested in the state by forfeiture should *instanti* and by operation of law be

"and are hereby transferred to and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs and devisees) for so much thereof as such person has or shall have had actual, continuous possession of under color or claim of title for ten years and who or those under whom he claims shall have paid the state taxes thereon for any five years during said possession;"

or if no such person,

81 "then to any person (other, etc.) for so much of said land as such person shall have title or claim to regularly derive, mediately or immediately, from or under a grant from the commonwealth of Virginia or this State, not forfeited, which but for the title forfeited would be valid and who, etc., has paid all state taxes, etc., for five years since 1865, or the date of said grant," etc.;

or if there be none of either of the above classes,

"then to any person who shall have had claim to and actual, continuous possession for any five successive years since 1865, of, "under color of title,' and paid all state taxes charged or chargeable thereon for said period."

The status of the former owner under the above has been well defined by the State Court in Maitland v. McClure, 24 W. Va. 561-576-581.

"The title to the land and all the right and interest of the former owner having thus by his default and the operation of the law become absolutely vested in the state and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem proper without consulting the former owner or any one else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the state saw proper to transfer and vest her title to so much of said land owned by her in

82 any person, other then those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same and was not in default for the

taxes thereon chargeable to him * * *

"And all the right, title and interest of the former owner having been completely divested, he has not a particle of interest in the land, no more than if he had never owned it."

"The whole history as well as the express language of this constitutional provision proves that it was the intention to bestow upon the former owner whatever part of the proceeds of sale might be actually paid or liable to be paid into the state treasury after the state had sold the land and paid all the taxes, costs, etc., out of the proceeds of sale; and that it was clearly not intended to give him any interest in the land, or its proceeds until a surplus should be ascertained by the proceedings conducted alone by the state through her officers. "Beggars must not be choosers' is a just maxim, and, therefore, it is the duty of the courts to see that the bounty of the state is not used to her detriment by giving to this provision of her constitution a forced construction and one that could never have been intended. I am, therefore, of opinion that said fifth section of the constitution did not confer upon the appel-ant, Maitland, any claim or interest in the land, or any interest or right to participate in the proceedings for its sale, his right to the surplus proceeds not arising until after the sale." And in Reed v. Dingess 8 C. C. A. (4th Ct.) 389-397; it is held:

"The statute gives the right, by its terms, of redemption, only after the state has commenced proceedings for sale of the forfeited land. But there is nothing in it setting a time within which the state must sell, or requiring it to sell at all. If the state desires to hold the land permanently as a state reservation, or park, or for public institutions, nothing in her legislation prevents it.
83 It is only if sale is attempted that a right to redeem is given; and the state can not be forced to sell."

For the person who may "take"—the claimant under "color" or "claim" to title—see Core v. Faupel, 25 W. Va., 239:

"The principal office of a 'claim' or 'color of title' is to define the boundaries and fix the extent of the adverse holding. If it is a mere claim of title, the adverse holding will be limited to the actual enclosure of the claimant. But if it is a deed or other paper-title, and the possession is exclusive, it will be regarded as co-extensive with the boundaires contained in such deed or paper. The 'color of title,' however, may be good or bad, legal or equitable.

As to the wisdom, of the "system," see Wild v. Serpell, 10 Grat. 409, quoted with approval in Maitland v. McClure, 24 W. Va. 576:

"In Wild v. Serpell, supra, Judge Lee, in delivering the opinion of the court says: 'Considering the peculiar condition of things in that portion of the state lying west of the Allegheny mountains, and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact then was clear and unquestionable.' 10 Grat. 409."

On the fourth Thursday in August, 1872, this constitutional pro-

vision became operative. By it all prior statutory provisions in conflict with it were swept out. An entire new condition was erected. The act of 1869 (Ch. 125, paragraph 7), first containing the provision was legislative in character, here it became constitu-
84 tional. "The head and the hoof, the haunch and the humph" of it was to compel the owner of land to have it entered on the land books for taxation. He was given more than two years substantially from the date of its adoption by the people to perform this constitutional requirement for it gave him five years from and after the year 1869 to do so which was equivalent to two years from and after the year 1872. It seems to me utterly immaterial whether the tract (if over 1000 acres) had been prior to that time sold to the state under void proceedings or not. This constitutional*y* provision required the true owner to determine for himself, within the time given, whether he was, or was not, the true owner of the tract and if he determined he was "to have it entered on the land books * * * and to cause himself to be charged with the taxes thereon and pay the same." If there was any doubt about his being the true owner he had need to be up and doing to settle the question by proper judicial proceeding if necessary. If the clerk refused to enter it on the books, it was his duty to bring proper legal proceedings to compel him to do so. That he had right to resort to such proceeding is clear because never yet has constitutional right and obligation arisen but legal remedy to enforce that right and legal aid in discharge of that obligation necessarily followed. The courts per force of their oath to support the constitution had necessarily to supply such legal remedy. To my mind, when it thus become a constitutional duty of the owner to "have entered" his land within five years after 1869, it is no answer to say that by a prior statute (Sec. 19, ch. 118, Acts 1863) the assessor was authorized to omit it and became therefore in effect clothed with judicial power to ascertain and determine the validity of tax sales and who was or was not the true owner of the land. I admit to establish such a condition, under conditions existing and
85 that have existed would be a practical absurdity. But no such condition can exist or be created by this statute as against this constitutional requirement.

In letter and spirit all statutory provisions antagonistic to constitutional ones must yield and stand aside. It is true the assessor may refuse to perform his duty in this regard as any ministerial officer is like- to do. He might refuse the true owner to enter his land when asked by him to do so. On the other hand he might in the name of the former owner enter land that had been properly theretofore sold for taxes and the true ownership thereby vested in another. In either case the remedy to all was open to have corrected by judicial proceeding the error of his ministerial acts, and the lia*n*ility of error on his part could not excuse the obligation upon the part of the owner himself to do all things necessary to comply with that obligation. The penalty provided by this constitutional provision for failure to comply with its requirements within five years from 1869 is clear and positive,—the absolute immediate forfeiture of the land to the state, *ex proprio vigore.*

As an independent proposition if I were called upon to reconcile sec. 19, Ch. 118, Acts 1863, which was incorporated in the Code of 1899 in Sec. 23, Ch. 29, with this sec. 6, Art. 13 of the Constitution, bearing in mind the supremacy of the latter, I would simply read the former's meaning to be "real estate purchased for the state at a sale for taxes shall not be thereafter entered on the land books" in the name of the state, the purchaser, "but the auditor shall keep a register thereof." Thus construed, it would be simply a directory provision for the guidance of clerks and assessors and in modification and harmony with those other statutory provisions requiring all lands "omitted" to be entered on the books and all transfers by conveyance, etc., to be certified and entry made. Thus construed,
its true purpose would be subserved for it is clear, it seems to
86 me, that the original purpose of the act was to destroy the
idea that the state must keep her own lands upon the tax books and have them subjected to taxation for county, district and municipal purposes. In this connection and as persuasive of this view, it is to be noted that very soon after the decisions of Sayers v. Burkhardt, 29 C. C. A. (4th Ct.) 137, and Totten v. Nighbert, 41 W. Va. 800, which apparently construed this statute as protecting the true owner from the constitutional obligation of causing his land to be entered on the books regardless of at least a void sale to the state, the Legislature by act of 1904, Ch. 4, sec. 36 amended and re-enacted in the Act of 1905, Ch. 35, Sec. 36, and incorporated in our last Code, 1906, as Sec. 720, amended the provision so as to carry out this original purpose of it without giving to it the apparent effect of protection to owners as aforesaid. The provision so amended and now in force provides:

Real estate purchased for the state, at a sale for taxes shall not be omitted from the land books, but no taxes shall be assessed thereon while the same remains the property of the state, etc.

Thus construed there can be no necessity to hold the clerk or assessor to be clothed with judicial powers and no impediment could be urged against their prompt compliance with the behest of the owner or even claimant of ownership seeking "to have his land entered for taxation in his name, himself charged with the taxes thereon, and to pay the same" as required by the constitutional provision. I am confronted, however, with the rulings in Sayers v. Burkhardt and Totten v. Nighbert which it is insisted make such construction impossible. I simply therefore make the suggestion with all deference.

But independent of my own views of this question, I regard the conclusion reached by me as inevitable for another reason. The
Supreme Court of Appeals of West Virginia has so held in two
87 well considered cases very recently decided. These cases are
Stockton v. Craig, 56 W. Va. 464.
Webb v. Ritter, 54 S. E. Rep. 484.

It is, however, earnestly insisted by counsel for plaintiff that these cases are in direct conflict with the cases of Totten v. Nighbert and Sayers v. Burkhardt. This may be true although it is to be noted that the same Judge rendering the opinions in Totten v. Nighbert

and Stockton v. Craig, strenuously insists in the latter that there is no conflict but complete harmony.

It is not necessary for me to express an opinion as to this further than to call attention to the facts that these last two cases directly and positively decide the exact question here involved after careful review of all former decisions; that there is no doubt or confusion in their rulings; and that they are the latest decisions of the court of last resort of this state not only construing its constitution and local statutes, but establishing by such construction a rule of property in this state.

Under such circumstances I regard it necessary, under decisions of the Supreme Court by which I am bound, to follow these local decisions independent of any Federal decision prior to their enunciation.

Polk v. Wendell, 9 Cranch 98;
Williams v. Kirtland, 13 Wall, 306;
Walker v. Commissioners, 17 Wall. 648;
Board of Supervision v. U. S. 18 Wall. 71;
Leffingwell v. Warren, 2 Black 599;
Suydam v. Williamson, 24 How. 427;
Loyd v. Fulton, 91 U. S. 479;
Green v. Neal, 6 Pet. 291.

88 It must, however, always be remembered that this rule has no application when a question arises in a Federal court, as to whether a local law or decision violates the constitution or laws of the United States. In such cases these courts must remember the supremacy of the Federal laws and their solemn obligation to maintain them as supreme. In this case it is insisted that this sec. 6, Art. 13 of the West Virginia Constitution contravenes the 14th Amendment of the Federal constitution. This question has been fully discussed by Brannon, Judge, in State v. Sponangle, 45 W. Va., 415, where it was held this article was not in violation of the Fourteenth Amendment and this decision has been affirmed by that court consistently ever since by such cases as

State v. Cheney, 45 W. Va. 478;
State v. Swann, 46 W. Va. 128;
Webb v. Ritter, 54 S. E. 484;

It has also been passed upon by the Supreme Court in two cases taken there from this court, and the same conclusion reached.

King v. Mullin, 171, U. S. 404.
King v. Panther Lumber Co. 171 U. S. 437.

In view of these decisions I must hold the provision not in conflict with the Fourteenth Amendment.

Finally I can not agree with counsel for plaintiff in the construction given to this sec. 6, Art. 13 of the State constitution in its application to the lands claimed by married women and others under disability. As I read it, whenever any owner of a tract of 1000 acres or more does not have it entered on the land books for taxation for any successive five years after the year 1869, forfeiture for such non-entry becomes complete but in case of those

owners under disability, *redemption* from such *forfeiture* so accrued may, within three years after removal of disability, be
89 made, "provided such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited." This being true it seems to me the conclusion to be reached is plain. In 1869 this 1200 a-re tract of land was off the land books and not assessed with taxes. By express constitutional requirement it was Mrs. Fay's duty, not later than 1874, to have it entered for such taxation. She did not do so. In 1875 it had been so off the tax books for "five successive years after the year 1869," and thereby became forfeited to the state. She had twenty years, or *unto* 1895, to redeem. She did not do so. The void sale by Auvil commissioner in 1882 and the subsequent claim of defendants thereunder can not aid her, and, in this action of ejectment, is immaterial. She must present and recover upon a good and valid title of her own. No privity of title or claim has ever existed between her and the defendants. Their deeds from commissioner Auvil, though void, were sufficient claim and color to base adverse possession upon and in time enable them to acquire good title against her and the world. There must be judgment entered for the defendants.

(Endorsed:) Wm. & Eliza T. Fay v. S. A. Crozer et al. Opinion. Circuit Court U. S. S. D. W. Va. Filed in office this 12th day of September, 1907. Edwin M. Keatley, Clerk.

90 And at another day, to-wit, at a Circuit Court of the United States for the Southern District of West Virginia continued and held at Charleston in said District on Wednesday the 15th day of January, A. D. 1908.

The following Judgment was made and entered of record:

*Order.*

No. 155.

WILLIAM FAY and ELIZA T. FAY
v.
SAMUEL A. CROZER et al.

In Ejectment.

This day came the plaintiffs and the defendants, Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, the Houston Coal & Coke Company, the Turkey Gap Coal & Coke Company, by their attorneys; and the Court having considered the questions arising in this case upon the pleadings and the agreed statement of facts heretofore filed herein and the arguments of counsel therein, announced that it was of the opinion that the plaintiffs were not entitled to recover of the defendants that portion of the land described in the Declaration which is involved in this trial, and that upon said agreed statement of facts the Court found in favor of the defendants as to said portion of land.

And thereupon after the Court had announced its opinion and

its finding in favor of said defendants, and before judgment had been rendered thereon, the plaintiffs moved the Court to set aside said finding and to render judgment in favor of the plaintiffs for the said portion of land involved in this trial for certain reasons and upon certain grounds stated in writing and fully set forth in plaintiffs' Bill of Exceptions No. 1 hereinafter mentioned. But the Court overruled said motion and request to set aside said finding and refused to render a judgment in favor of the plaintiffs for the portion of land involved in this trial; to which action and ruling of the
91 Court plaintiffs excepted, and prayed that their said exceptions might be saved to them on the record, which is done accordingly. And thereupon, for reasons contained in a written opinion prepared by his Honor, Judge Dayton, and filed herein as part of the record of this case, the Court doth find that the plaintiffs are not entitled to recover that portion of the land described in the Declaration, and which is involved in this trial, namely, that part of the tract of land in controversy which is shown on the map of surveyor Graham filed in this action and included within the following lines and letters, namely:

Beginning at T, thence to D, thence to E, thence to F, thence to S, thence to T; being those portions of the 1200 acres described in the Declaration lying south-west of the line between the Wilson-Cary Nicholas 500,000 acre survey and the Pickett survey of 40,000 acres, and included within the leaseholds of the Houston Coal & Coke Company and the Turkey Gap Coal & Coke Company, as shown on the map filed in this case.

Therefore it is considered by the Court that as to the portion of land above described the plaintiffs take nothing by their bill, and that the defendants, Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, the Houston Coal & Coke Company and the Turkey Gap Coal & Coke Company go *therefore* without day and that the said defendants do recover of the plaintiffs their costs about them by their defense in this behalf expended, including an attorney's fee of $10. allowed by law; to which action and ruling of the Court in finding that the plaintiffs are not entitled to recover said land above described from the said defendants and in rendering said judgment against the said plaintiffs, and in favor of the said defendants, said plaintiffs objected and excepted. Thereupon the said plaintiffs moved the Court to set aside said judgment and grant them a new trial on the ground
92 First. That said judgment is contrary to the law as applied to the agreed statement of facts in this case.

Second. Because the Court erroneously decided from the facts in this case that the plaintiffs' title to the land involved in this trial had become forfeited to the State of West Virginia by reason of its non-entry upon the land books of McDowell County under the provisions of section six of Article 13 of the Constitution of West Virginia, and by such holding and the judgment entered in this cause the plaintiffs would be deprived of their property without due process of law, and that said section 6 of Article 13 of the Constitution of West Virginia, as so construed and applied in this cause by the

Court is in conflict with the Fourteenth Amendment to the Constitution of the United States.

Third. For the same reasons and grounds which are alleged by the plaintiffs as grounds for their motion to set aside the finding of the Court in favor of the defendants and to render a judgment for the plaintiffs.

But the Court refused to set aside said judgment and grant the plaintiffs a new trial, to which action and ruling of the Court in refusing to set aside said judgment and grant a new trial the plaintiffs excepted.

And thereupon the plaintiffs tendered to the Court their Bill of Exceptions marked "Plaintiffs' Bill of Exceptions No. 1, and prayed the Court to sign, seal and enroll the same as a part of the record in this case, which is done accordingly.

And at another day, to wit, on the 18th day of January, 1908, there was filed in the Clerk's office of said Court the motion to set aside the Court's finding, and Bill of Exceptions referred to in the foregoing Judgement, which are in the words and figures as follows:

*Motion to Set Aside Court's Finding.*

In the Circuit Court of the United States for the Southern District of West Virginia.

93 WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER et al.

Ejectment.

Plaintiffs move the Court to set aside its finding in favor of the defendants and to render a judgment in favor of plaintiffs on the agreed statement of facts, for the portion of land in controversy which is involved in this trial, for the following reasons and upon the following grounds, to-wit;

1. Because the plaintiffs Eliza T. Fay and her husband have never sold or conveyed to any one the land *on* controversy in this case or any part thereof or any interest therein.

2. Because there was no forfeiture of the title to the undivided interest of Eliza T. Fay in the land in controversy on this trial because of its omission from the land books prior to the year 1865.

3. Because the tax sales of this tract of land made by the sheriff of McDowell County in the month of October, 1869, set forth in paragraph 7 of the agreed statement of facts were null and void and that the State of West Virginia acquired no title to the 1200 acres of land by said sales.

4. Because the proceedings by Henry C. Auville, Commissioner of school lands, in 1882, against the said 1200 acre tract of land, and the deeds made under said proceedings were void.

5. Because the title of Eliza T. Fay in said lands was not divested or affected by the said tax sales of 1869 or by the proceedings of the

Commissioner of school lands in 1882, and the deeds made under said proceedings.

6. Because the title of Eliza T. Fay to an undivided half interest in said tract of 1200 acres of land was not forfeited by the omission of said land from the land books by the Clerk of the County Court after its sale for taxes in 1869 because the Clerk was required by section 23 of chapter 29 of the Code of West Virginia to omit
94 from the land books land purchased by the State at tax sales. Sayers vs. Burkhart, 29 C. C. A. 137.

7. Because the title of Eliza T. Fay to one undivided half interest in said tract of 1200 acres has not become forfeited to the State of West Virginia by the omission of said land from the land books of McDowell County from 1870 to 1905 inclusive, so as to prevent her from maintaining this action.

8. Because section 6 of Article 13 of the Constitution of West Virginia, so far as it provides for the forfeiture of a tract of land containing 1000 acres or more for the failure of the owner to enter it on the land books of the county in which it is situated and to cause himself to be charged with the taxes thereon and pay the same and to vest the title thereto in the State without any inquest or judicial proceeding, is in conflict with the Fourteenth Amendment to the Constitution of the United States, because the effect of it is to deprive the owner of his property without due process of law.

9. Because the Court will not hold that Eliza T. Fay's interest in that portion of the 1200 acres of land involved in this case was forfeited to the State of West Virginia under and by virtue of section 6 of Article 13 of the Constitution of West Virginia by reason of its omission from the land books of McDowell County from 1870 to 1905 both inclusive in the name of said plaintiff, because, under the facts of this case, to so hold would deprive the said plaintiff of her property without due process of law and such a construction of said section 6 of Article 13 of the Constitution would render it obnoxious to and in conflict with the Fourteenth Amendment to the Constitution of the United States.

10. Because the Constitution and Statutes of West Virginia provide no means for contesting a forfeiture for non-entry claimed under said section 6 of Article 13, except in a proceeding by the Commissioner of school lands to sell said lands for the benefit of the school fund.

95 11. Because by the proceedings by the Commissioner of School Lands in 1882, the State's claim for taxes against said tract of 1200 acres of land was paid and satisfied up to the year 1883, and that said payment and satisfaction and the payment of the taxes thereon by the purchasers under said proceedings and those claiming under them since 1883 up to the year 1905, accrued to the benefit of the plaintiff, Eliza T. Fay, to the extent of her interest in said land and has prevented a forfeiture of the title of said Eliza T. Fay in said land for non-entry on the land books in her name during said period. And that by reason of such payment the State could not again, since 1882, proceed by suit to sell said lands for the benefit of the school fund.

12. Because under the facts in this case there have been no pro-

ceedings constituting due process of law in which the forfeiture of the title of Eliza T. Fay has been declared and adjudicated, to which she was a party, and that the Constitution and Statutes of West Virginia provide for no such proceedings as applied to the facts of this case since 1882, and therefore her land has not been forfeited under the provisions of section 6 of Article 13 of the Constitution of West Virginia, because such a forfeiture under the facts of this case, would be to deprive her of her property without due process of law and would be in violation of the Fourteenth Amendment to the Constitution of the United States.

13. Because the estate which was vested in the plaintiff, Eliza T. Fay, by the patent from the Commonwealth of Virginia, dated January 3, 1860, was a common law estate in fee simple, and she, having been at that time a married woman, and having continued under coverture up to the present time, the Statute of Limitations to an action for the recovery of her said estate in West Virginia, is twenty years.

14. Because the plaintiff's right to recover in this action was
96 not barred by the Statute of Limitations relating to actions for the recovery of land at the time this suit was brought.

15. And therefore upon the agreed statement of facts the plaintiffs are entitled to recover in this action.

PRICE, SMITH, SPILMAN & CLAY,
*Counsel for Plaintiffs.*

(Endorsed:) No. 155. Eliza Fay et al., v. S. A. Crozer et al. Motion to set aside Court finding. Circuit Court U. S. S. D. W. Va. Filed in open Court this 18th day of January, 1908. Edwin M. Keatley, Clerk.

*Bill of Exceptions No. I.*

In the Circuit Court of the United States for the Southern District of West Virginia.

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER and Others.

Ejectment.

Be it remembered that upon the trial of this case before the Court in lieu of a jury, the plaintiffs and the defendants, Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal & Coke Company, presented to the Court a stipulation in writing marked Exhibit A, which stipulation, among other things, contained an agreed statement of facts of this case and which said stipulation is in the words and figures following, to-wit: (Clerk will here copy in full said Exhibit A); and neither party having offered any
97 evidence outside of said agreed statement of facts and not desiring to do so, thereupon the case as to the portion of land in the declaration mentioned, which is set forth and described in

said stipulation, was submitted to the Court in lieu of a jury and was argued by counsel for both parties.

Thereupon the Court having considered the questions arising upon the pleadings and said agreed statement of facts and the arguments of counsel thereon, announced that it was of opinion that the plaintiffs were not entitled to recover of the defendants that portion of the land described in the declaration which is involved in this trial, and that upon said agreed statement of facts it found in favor of the defendants as to said portion of land.

And thereupon after the Court had announced its opinion and its finding in favor of said defendants and before judgment had been rendered thereon, the plaintiffs moved the Court to set aside said finding and to render a judgment in favor of the plaintiffs for the said portion of the land involved in this trial for the following reasons and upon the following grounds, to-wit:

1. Because the plaintiffs Eliza T. Fay and her husband have never sold or conveyed the said tract of land or any portion of it or any interest therein to any person.

2. Because there was no forfeiture of the title to the undivided interest of Eliza T. Fay in the land in controversy in this trial because of its omission from the land books prior to the year 1865.

3. Because the tax sales of this tract of land made by the Sheriff of McDowell County in the month of October, 1869, set forth in paragraph 7 of the agreed statement of facts were null and void, and that the State of West Virginia acquired no title to the 1200 acres of land by said sales.

98 4. Because the proceedings by Henry C. Auville, Commissioner of school lands, in 1882, against the said 1200 acre tract of land, and the deeds made under said proceedings were void.

5. BeBcause the title of Eliza T. Fay in said lands was not devested or affected by the said tax sales of 1869 or by the proceedings of the Commissioner of school la*b*ds in 1882, and the deeds made under said proceedings.

6. Because the title of Eliza T. Fay to an undivided half interest in said tract of 1200 acres of land was not forfeited by the omission of said land from the land books by the Clerk of the County Court after its sale for taxes in 1869, because the Clerk was required by section 23 of Chapter 29 of the Code of West Virginia to omit from the land books lands purchased by the State at tax sales. Sayers vs. Burkhart, 29 C. C. A. 137.

7. Because the title of Eliza T. Fay to one undivided half interest in said tract of 1200 acres has not become forfeited to the State of West Virginia by the omission of said land from the land books of McDowell County from 1870 to 1905 inclusive, so as to prevent her from maintaining this action.

8. Because section 6 of Article 13 of the Constitution of West Virginia, so far as it provides for the forfeiture of a tract of land containing 1000 acres or more for the failure of the owner to enter it on the land books of the county in which it is situated and to cause himself to be charged with the taxes thereon and pay the same and to vest the title thereto in the State without any inquest or judicial proceeding, is in conflict with the Fourteenth Amendment to the

Constitution of the United States, because the effect of it is to deprive the owner of his property without due process of law.

9. Because the Court will not hold that Eliza T. Fay's interest in that portion of the 1200 acres of land involved in this case
99 was forfeited to the State of West Virginia under and by virtue of section 6 of Article 13 of the Constitution of West Virginia by reason of its omission from the land books of McDowell County from 1870 to 1905 both inclusive in the name of said plaintiff, because, under the facts of this case, to so hold would deprive the said plaintiff of her property without due process of law and such a construction of said section 6 of Article 13 of the Constitution would render it obnoxious to and in conflict with the Fourteenth Amendment to the Constitution of the United States.

10. Because the Constitution and Statutes of West Virginia provide no means for contesting a forfeiture for nonentry claimed under said section 6 of Article 13, except in a proceeding by the Commissioner of school lands to sell said lands for the benefit of the school fund.

11. Because by the proceedings by the Commissioner of School Lands in 1882, the State's claim for taxes against said tract of 1200 acres of land was paid and satisfied up to the year 1883, and that said payment and satisfaction and the payment of the taxes thereon by the purchasers under said proceedings and those claiming under them since 1883 up to the year 1905 accrued to the benefit of the plaintiff, Eliza T. Fay, to the extent of her interest in said land and has prevented a forfeiture of the title of said Eliza T. Fay in said land for nonentry on the land books in her name during said period. And that by reason of such payment the State could not again, since 1882, proceed by suit to sell said lands for the benefit of the school fund.

12. Because under the facts in this case there have been no proceedings constituting due process of law in which the forfeiture of the title of Eliza T. Fay has been declared and adjudicated, to which she was a party, and that the Constitution and Statutes of West Virginia provide for no such proceedings as applied to the facts
100 of this case since 1882, and therefore her land has not been forfeited under the provisions of section 6 of Article 13 of the Constitution of West Virginia, because such a forfeiture under the facts of this case would be to deprive her of her property without due process of law and would be in violation of the Fourteenth Amendment to the Constitution of the United States.

13. Because the estate which was vested in the plaintiff Eliza T. Fay, by the patent from the Commonwealth of Virginia, dated January 3, 1860, was a common law estate in fee simple, and she, having been at that time a married woman, and having continued under coverture up to the present time, the Statutes of Limitations to an action for the recovery of her said estate in West Virginia, is twenty years.

14. Because the plaintiff's right to recover in this action was barred by the Statute of Limitations relating to actions for the recovery of lands at the time this suit was brought.

15. And therefore upon the agreed statement of facts the plaintiffs are entitled to recover in this action.

But the Court overruled said motion and refused to set aside said finding and render a judgment in favor of the plaintiffs, to which action and ruling of the Court the Plaintiffs excepted and prayed that this their exception might be saved to them upon the record, which is done accordingly.

And thereupon, for reasons contained in the written opinion prepared by his Honor, Judge Dayton, and filed as a part of the record of this case and which is here made a part of this bill of exceptions, the Court rendered its judgment against the said plaintiffs and in favor of the said defendants for the said portion of land involved in its trial, and bounded and described as follows, to-wit: That part of the tract of land in controversy shown on the map of sur-
101 veyor Graham filed in this action, and embraced within the following lines and letters, namely: Beginning at T and running thence to D, and thence to E, and thence to F, and thence to S, and thence to T; and also for the costs of this suit, to which action and ruling of the Court in rendering said judgment against the plaintiffs and in favor of said defendants, the said plaintiffs objected and excepted and prayed the Court that their said exception might be saved to them upon the record, which is done accordingly.

Thereupon, the said plaintiffs moved the Court to set aside said judgment and grant them a new trial on the grounds,

First. That said judgment is contrary to the law as applied to the agreed statement of facts in this case.

Second. Because the Court erroneously decided from the facts in this case that the plaintiffs' title to the land involved in this trial had become forfeited to the State of West Virginia by reason of its non-entry upon the land books of McDowell County under the provisions of section 6 of Article 13 of the Constitution of West Virginia, and by such holding and the judgment entered in this cause the plaintiffs will be deprived of their property without due process of law, and that said section 6 of Article 13 of the Constitution of West Virginia, as so construed and applied in this cause by the Court, is in conflict with the Fourteenth Amendment to the Constitution of the United States.

Third. For the same reasons and grounds which were alleged by the plaintiffs as grounds for their motion to set aside the finding of the Court in favor of the defendants and to render a judgment for plaintiffs.

But the Court overruled said motion and refused to set aside said judgment and to grant the plaintiffs a new trial, to which action and ruling of the Court the said plaintiffs objected and excepted and prayed that their said exception might be saved to them upon the record, which is done accordingly.

102 And thereupon, the said plaintiffs presented to the Court this their Bill of Exceptions No. 1, and prayed that it might be signed, sealed and enrolled and made a part of the record of this case, which is done accordingly.

ALSTON G. DAYTON,
*Judge Presiding.* [SEAL.]

(Endorsed:) No. 155. Wm. & Eliza T. Fay v. S. A. Crozer et al. Bill of Exceptions No. 1. Circuit Court S. D. W. V. A. Filed in open Court this 18th day of January, 1908. Edwin M. Keatley, Clerk.

And at another day, to-wit, at a Circuit Court of the United States for the Southern District of West Virginia, continued and held at Charleston in said district on Monday the 9th day of March, A. D. 1908, the following order was made and entered of record:

*Order Allowing Writ of Error.*

No. 155.

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER and Others.

In Ejectment.

On this 9th day of March, 1908, came the plaintiffs by George E. Price, their attorney, and filed herein and presented to the Court their petition praying for the allowance of a writ of error and also an assignment of errors intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

103 On consideration whereof the Court doth allow the said writ of error upon the plaintiffs giving bond according to law in the sum of $500., which shall operate as supersedeas bond.

The petition for writ of error and assignment of errors referred to in the foregoing order are in the words and figures as follows:

*Petition for Writ of Error.*

In the Circuit Court of the United States for the Southern District of West Virginia.

WILLIAM FAY and ELIZA T. FAY
v.
SAMUEL A. CROZER and Others.

In Ejectment.

William Fay and Eliza T. Fay, plaintiffs in the above entitled cause, feeling themselves aggrieved by the decision of the Court and the judgment entered in said cause on the 15th day of January, 1908, come now by George E. Price, their attorney, and say that on the 15th day of January, 1908, the said Circuit Court of the

United States for the Southern District of West Virginia entered a judgment herein in favor of the defendants against these plaintiffs, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these plaintiffs pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

GEO. E. PRICE,
*Attorney for Plaintiff.*

(Endorsed:) William Fay and Eliza R. Fay, vs. Samuel A. Crozer et als. Petition for Writ of Error. Circuit Court U. S. So. Dist. West Va. Filed in open Court this 9th day of March, 1908. Edwin M. Keatley, Clerk.

104 *Assignment of Errors.*

In the Circuit Court of the United States for the Southern District West Virginia.

WILLIAM FAY and ELIZA T. FAY
vs.
SAMUEL A. CROZER and Others.

In Ejectment.

The plaintiffs in this action, in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred in the proceedings and upon the trial of the cause, to-wit:

First. The Court erred in finding in favor of the defendants upon the agreed statement of facts set out in the record.

Second. The Court erred in holding that the title of the plaintiff Eliza T. Fay, to an undivided half interest in the tract of 1200 acres of land in the declaration mentioned, was forfeited to the State of West Virginia by its omission from the land books of McDowell County, West Virginia, by the Clerk of the County Court after its sale for taxes in 1869, and purchase by the State.

Third. The Court erred in holding that the title of Eliza T. Fay to an undivided half interest in said tract of 1200 acres was forfeited to the State of West Virginia by its omission from the land books of McDowell County from 1870 to 1905, inclusive, and that this prevented the plaintiffs from maintaining this action.

Fourth. The Court erred in holding that the said interest of Eliza T. Fay in the said tract of land was forfeited by its omission from the land books of McDowell County from 1870 to 1905 in her name, under the provisions of Section 6 of Article 13 of the Con-

stitution of West Virginia, without any inquest or judicial proceedings.

105 These plaintiffs aver that said Section 6 of Article 13 of the Constitution of West Virginia, in so far as it provides for the forfeiture of land for the failure of the owner to enter it on the land books of the county where it is situated and to cause himself to be charged with taxes thereon and pay the same, is in conflict with the Fourteenth Amendment to the Constitution of the United States because the effect of it is to deprive the owner of his property without due process of law, and the said Circuit Court erred in not so holding.

Fifth. The Court erred in refusing to hold that by the proceedings by the Commissioner of School Lands in 1882 and the sale of said tract of 1200 acres in said proceedings, the State's claim for taxes against the said 1200 acres was paid and satisfied up to the year 1883, and that said payment and satisfaction and the payment of the taxes thereon by the purchasers under said proceedings and those claiming under them since 1883 up to the year 1905, accrued to the benefit of the plaintiff, Eliza T. Fay, to the extent of her interest in said lands and prevented a forfeiture of the title of said Eliza T. Fay in said land for non-entry on the land books in her name during said period, and also prevented the State from again instituting any proceedings to sell said land for the benefit of the school fund as forfeited and thereby deprived the said Eliza T. Fay of any opportunity to redeem said land, or to contest such alleged forfeiture.

Sixth. The Court erred in not holding that there had been no proceedings constituting due process of law in which the forfeiture of the title of Eliza T. Fay had been declared and adjudicated to which she was a party, and that the Constitution and Statutes of West Virginia provide for no such proceedings as applied to the facts of this case since 1882, and that therefore her land has not been forfeited under the provisions of section 6 of Article 13 of the Constitution of West Virginia, because to so hold that

106 there had been such forfeiture under the facts of this case is to deprive her of her property without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

Seventeenth. The Court erred in refusing to set aside its findings in favor of the defendants and to render a judgment in favor of the plaintiffs for the reasons and upon the grounds stated in writing and fully set forth in plaintiffs' Bill of Exceptions No. 1, as follows, viz:

1. Because the plaintiffs, Eliza T. Fay and her husband, have never sold or conveyed to any one the land in controversy in this case or any part thereof or any interest therein.

2. Because there was no forfeiture of the title to the undivided interest of Eliza T. Fay in the land in controversy on this trial because of its omission from the land books prior to the year 1865.

3. Because the tax sales of this tract of land made by the Sheriff of McDowell County in the month of October, 1869, set forth in

paragraph 7 of the agreed statement of facts were null and void and that the State of West Virginia acquired no title to the 1200 acres of land by said sales.

4. Because the proceedings by Henry C. Auville, Commissioner of school lands, in 1882, against the said 1200 acre tract of land, and the deeds made under said proceedings were void.

5. Because the title of Eliza T. Fay in said lands was not divested or affected by the said tax sales of 1869 or by the proceedings of the Commissioner of School Lands in 1882, and the deeds made under said proceedings.

6. Because the title of Eliza T. Fay to an undivided half interest in said tract of 1200 acres of land was not forfeited by the omission of said land from the land books by the Clerk of the County
107 Court after its sale for taxes in 1869 because the Clerk was required by section 23 of Chapter 29 of the Code of West Virginia to omit from the land books land purchased by the State at tax sales. Sayers vs. Burkhart, 29 C. C. A. 137.

7. Because the title of Eliza T. Fay to one undivided half interest in said tract of 1200 acres has not become forfeited to the State of West Virginia by the omission of said land from the land books of McDowell County from 1870 to 1905, inclusive, so as to prevent her from maintaining this action.

8. Because Section 6 of Article 13 of the Constitution of West Virginia so far as it provides for the forfeiture of a tract of land containing 1000 acres or more for the failure of the owner to enter it on the land books of the county in which it is estimated and to cause himself to be charged with the taxes thereon and pay the same and to vest the title thereto in the State without any inquest or judicial proceeding, is in conflict with the Fourteenth Amendment to the Constitution of the United States, because the effect of it is to deprive the owner of his property without due process of law.

9. Because the Court will not hold that Eliza T. Fay's interest in that portion of the 1200 acres of land involved in this case was forfeited to the State of West Virginia under and by virtue of Section 6 of Article 13 of the Constitution of West Virginia by reason of its omission from the land books of McDowell County from 1870 to 1905 both inclusive in the name of said plaintiff, because, under the facts of this case, to so hold would deprive the said plaintiff of her property without due process of law and such a construction of said Section 6 of Article 13 of the Constitution would render it obnoxious to and in conflict with the Fourteenth Amendment to the Constitution of the United States.

10. Because the Constitution and Statutes of West Virginia provide no means for contesting a forfeiture for non-entry claimed under said Section 6 of Article 13, except in a proceeding by
108 the Commissioner of School Lands to sell said lands for the benefit of the school fund.

11. Because by the proceedings by the Commissioner of School Lands in 1882, the State's claim for taxes against said tract of 1200 acres of land was paid and satisfied up to the year 1883, and that said payment and satisfaction and the payment of the taxes thereon by the purchasers under said proceedings and those claiming under

them since 1883 up to the year 1905 accrued to the benefit of the plaintiff, Eliza T. Fay, to the extent of her interest in said land and has prevented a forfeiture of the title of said Eliza T. Fay in said land for non-entry on the land books in her name during said period; and that by reason of such payment the State could not again, since 1882, proceed by suit to sell said lands for the benefit of the school fund.

12. Because under the facts in this case there have been no proceedings constituting due process of law in which the forfeiture of the title of Eliza T. Fay has been declared and adjudicated, to which she was a party, and that the Constitution and Statutes of West Virginia provide for no such proceedings as applied to the facts of this case since 1882, and therefore her land has not been forfeited under the provisions of section 6 of Article 13 of the Constitution of West Virginia, because such a forfeiture under the facts of this case would be to deprive her of her property without due process of law and would be in violation of the Fourteenth Amendment to the Constitution of the United States.

13. Because the estate which was vested in the plaintiff Eliza T. Fay, by the patent from the Commonwealth of Virginia, dated January 3, 1860, was a common law estate in fee simple, and she, having been at that time a married woman, and having continued under coverture up to the present time, the Statute of Limitations to an action for the recovery of her said estate in West Virginia, is twenty years.

109 14. Because the plaintiffs' right to recover in this action was not barred by the Statute of Limitations relating to actions for the recovery of land at the time this suit was brought.

15. And therefore upon the agreed statement of -acts the plaintiffs are entitled to recover in this action.

Eighth. Said Court erred in refusing to set aside its judgment in favor of the defendants and to grant the plaintiffs a new trial.

1. Because said judgment was contrary to the law as applied to the agreed statement of facts in this case.

2. Because the Court erroneously decided from the facts in this case that the plaintiffs' title to the land involved in this trial had become forfeited to the State of West Virginia by reason of its non-entry upon the land books of McDowell County, under the provisions of Section 6 of Article 13 of the Constitution of West Virginia, and by such holding and the judgment entered in this cause, plaintiffs were deprived of their property without due process of law; and said Section 6 of Article 13 of the Constitution of West Virginia, as so construed and applied in this cause by the Court, is in conflict with the Fourteenth Amendment to the Constitution of the United States.

GEO. E. PRICE,
*Attorney for Plaintiffs.*

(Endorsed:) William T. Fay and Eliza T. Fay vs. Samuel T. Crozer. Assignment of Errors. Circuit Ct. U. S. S. D. W. Va. Filed in open Court this 9th day of March, 1908. Edwin M. Keatly, Cler-.

110 Know all men by these presents:

That we, William Fay and Eliza T. Fay, as principals, and Citizens Trust & Guaranty Company, of West Virginia, as surety, are held and firmly bound unto Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal & Coke Company in the full and just sum of $500.00 to be paid to the said Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal and Coke Company, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made and done we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 30th day of March, 1908.

Whereas, lately at a Circuit Court of the United States for the Southern District of West Virginia held on the 15th day of January, 1908, in a suit *de*pending in said Court between William Fay and Eliza T. Fay, his wife, plaintiffs and Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal & Coke Company, defendants, a judgment was rendered against the said William Fay and Eliza T. Fay, and the said William Fay and Eliza T. Fay, having obtained a writ of error, filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal & Coke Company, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the — day of —— next.

Now the condition of the above obligation is such that if the said William Fay and Eliza T. Fay shall prosecute said writ
111 of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

WILLIAM FAY. [SEAL.]

[SEAL.] ELIZA T. FAY,

By GEORGIA FAY MERRILL. [SEAL.]
*Her Attorney in Fact.*

CITIZENS TRUST & GUARANTY CO. OF WEST VIRGINIA,

By EMORY C. JONES,
*Attorney in Fact.*

Signed, sealed and delivered in the presence of
MRS. E. ALICE SCULL,
MATTIE FAY, *Witnesses.*

Approved by
ALSTON G. DAYTON,
*U. S. Dist. Judge.*

(Endorsed:) William Fay and Eliza T. Fay vs. Samuel A. Crozer et als. Bond. Circuit Court U. S. So. Dist. West Va. Filed in office this 7th day of May, 1908. Edwin M. Keatley, Clerk.

112 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Southern District of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between William Fay and Eliza T. Fay, his wife, plaintiffs and Samuel A. Crozer, John P. Crozer, and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal and Coke Company, the last two named being corporations, a manifest error hath happened, to the great damage of the said William Fay and Eliza T. Fay, his wife, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7" day of May, in the year of our Lord one thousand nine hundred and eight.

[Seal Circuit Court United States, Southern District West Virginia, Charleston, West Va.]

EDWIN M. KEATLEY,
*Clerk of the Circuit Court of the United States for the S. D. W. Va.*

Allowed by
HON. ALSTON G. DAYTON,
*Circuit Judge.*

113 UNITED STATES OF AMERICA, *ss:*

To Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company, a corporation, and Turkey Gap Coal & Coke Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of West Virginia, sitting at Charleston in said District, wherein William Fay and Eliza T. Fay, his wife, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alston G. Dayton, Judge of the Circuit Court of the United States, this seventh day of May, in the year of our Lord one thousand nine hundred and eight.

ALSTON G. DAYTON,
*— Circuit Court of the United States.*

*Acceptance of Service.*

Legal service of the within Citation is acknowledged this the 13" day of May 1908, for Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, Houston Coal & Coke Company and Turkey Gap Coal & Coke Company, corporations.

RUCKER, ANDERSON, STROTHER & HUGHES,
*Attorneys.*

114 UNITED STATES OF AMERICA,
*Southern District of West Virginia, ss:*

I, Edwin M. Keatley, Clerk of the Circuit Court of the United States for the Southern District of West Virginia, do certify that the foregoing is a true and complete transcript of the record and proceedings in the case of William Fay and Eliza T. Fay, his wife vs. Samuel A. Crozer and others, In Ejectment, and now of record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said Court, at Charleston, in said District this the 14" day of May A. D. 1908, and in the one hundred and thirty-second year of the Independence of the United States — America.

[Seal Circuit Court United States, Southern District West Virginia, Charleston, West Va.]

EDWIN M. KEATLEY,
*Clerk C. C. U. S., S. D. W. Va.*

Endorsed on cover: File No. 21,185. S. West Virginia C. C. U. S. Term No. 165. William Fay and Eliza T. Fay, his wife, plaintiffs in error, vs. Samuel A. Crozer, John P. Crozer, and Mary Crozer Page, trustees of the Crozer Land Association, et al. Filed May 21st, 1908. File No. 21,185.

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No. 165.

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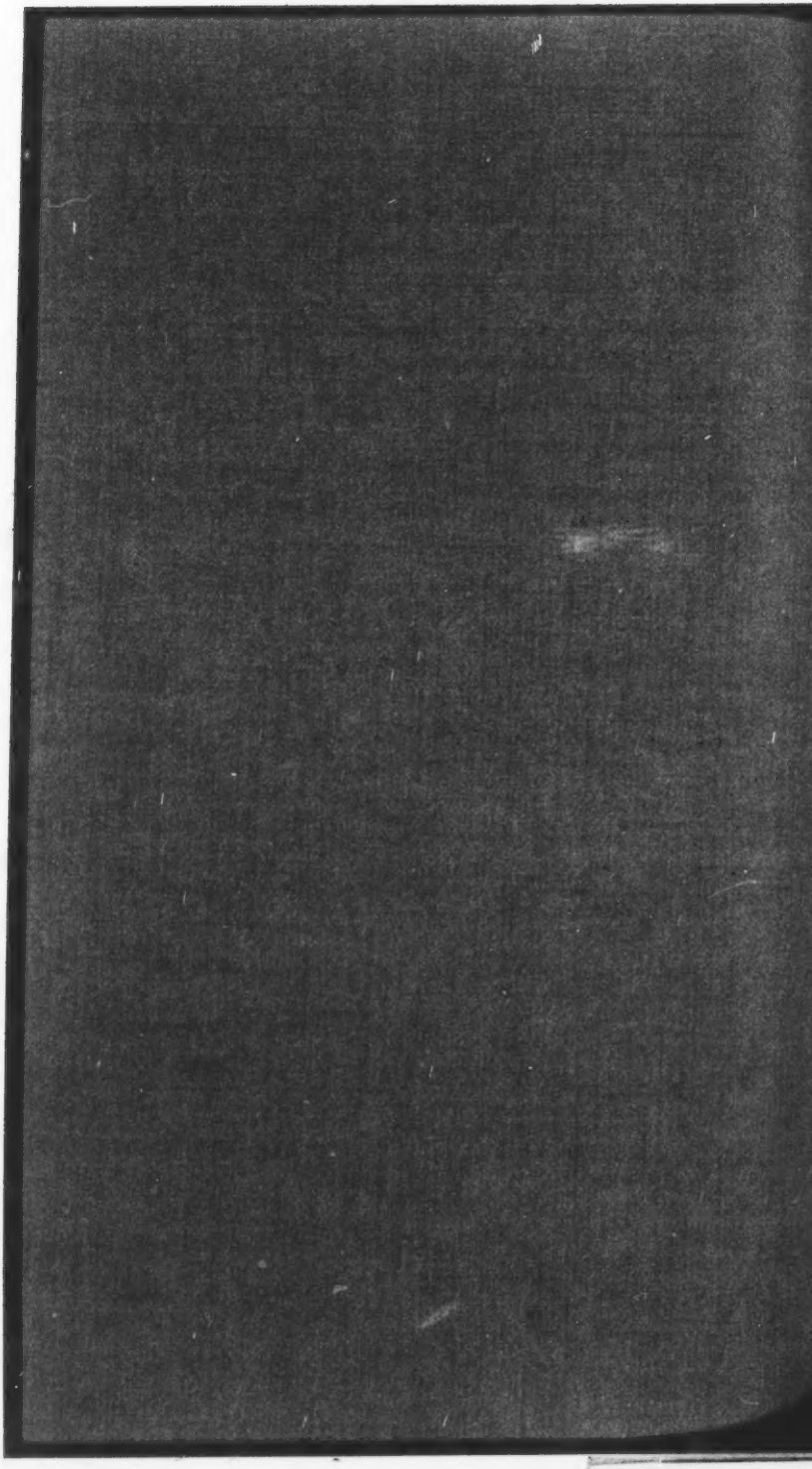

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# SUPREME COURT OF THE UNITED STATES

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**OCTOBER TERM, 1909.**

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## No. 165.

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WILLIAM FAY and ELIZA T. FAY, his wife, *Plaintiffs in Error,*

*versus*

SAMUEL A. CROZER and Others, *Defendants in Error.*

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BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR.

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This is an action of ejectment. The declaration and notice was served on the defendants March 22nd., 1901, requiring them to appear at Rules to be held on the first Monday in April, 1901, and plead to the declaration. Under our practice in West Virginia, therefore, the case must be considered as having been brought on the 22nd day of March, 1901. The suit is brought by William Fay and Eliza T. Fay, his wife, citizens of Michigan, against Samuel A. Crozer, John P. Crozer and Mary Crozer Page, Trustees of the Crozer Land Association, and certain Coal Companies, tenants of the said Crozer Land Association, to recover an undivid-

AGES

ed one-half interest in a tract of land containing 1200 acres situated in McDowell County, West Virginia. An order of survey was entered in the cause on the 17th of June, 1902, directing W. R. Graham, surveyor, to do such surveying of the lands in controversy as each party might require. The surveyor located the 1200 acres claimed by the plaintiffs in their declaration and also located three parcels known as the William Belcher 113 acres, Strahley, French and Welch 1281 acres, and the J. W. Harman 46 acres, which three parcels conflict with and include within their boundaries the Southwestern portion of the 1200 acres claimed by the plaintiffs. He also located the leaseholds of the Turkey Gap Coal & Coke Company and the Houston Coal & Coke Company, covering the same territory, and also other portions of the 1200 acres; these coal companies being lessees of the Crozer Land Association. The Trustees of the Crozer Land Association and the two Coal Companies above named appeared on the 13th of November, 1906, and entered the plea of not guilty, which is the only plea authorized under the statute of West Virginia in an action of ejectment. Code of West Virginia of 1906, sec. 3348 (ch. 90, sec. 13). Under this plea the defendant may give in evidence any matter which if pleaded in the former writ of right would have barred the action of the plaintiff; in other words, it lets in all defenses in bar of the action.

At the November term 1906 of the Circuit Court the case was tried before the Judge instead of a jury, both parties waiving a jury, and the facts were agreed, no evidence being offered outside of the agreed statement of facts, which is contained in the record on pages 11 to 16 inclusive, with the exhibits following, extending to page 41. The case was tried, however, as to only a part of the land, namely, that part designated on the maps by the letters T D E F S R T, being all that part of the 1200 acre tract lying Southwest of the division line between the Wilson, Carey, Nicholas 500,000 acre survey and the Picket 40,000 acre survey, and designated on the map by the line S T.

## STATEMENT OF FACTS.

### Plaintiff's Title.

The facts briefly stated are as follows:

The 1200 acre tract in the declaration described was granted by the Commonwealth of Virginia to the plaintiff, Eliza T. Fay, and Samuel W. Austin by patent dated January 3rd, 1860 (Record, page 16.)

At and before the date of said patent, Eliza T. Fay was a married woman, the wife of William Fay, and has continually remained under coverture with the same husband up to and including the time of trial, they living together all the time as man and wife.

Neither the said Eliza T. Fay nor her husband, William Fay, have ever sold or conveyed, or attempted to sell or convey the said tract of land, or any part thereof, or any interest therein. This tract of 1200 acres was not assessed for taxes prior to the year 1865, but for the year 1865 it was assessed to Eliza Fay and E. F. Harman; for 1866 and 1867 to Eli Fay and E. F. Harman; for 1868 and 1869 to Eli Fay and E. F. Harman. It has never been assessed since 1869 in the name of Eliza T. Fay or Samuel W. Austin or anyone claiming under said patent.

No taxes have ever been paid since the date of the patent on this 1200 acres by the patentees, or anyone claiming under them.

### Sale for Taxes in 1869.

In October 1869 the Sheriff of McDowell County sold this 1200 acre tract for the delinquent taxes of 1865 & 6, and also for the delinquent taxes of 1867 and 1868, at both of which sales the land was purchased for the State of West Virginia. These tax sales and the proceedings under them were irregular and void, as the recorder of McDowell County did not note on said list of sales the day when the Sheriff returned the same to his office, and the record does not show when the lists were returned by the Sheriff to the recorder's office. The certificate of the Sheriff to the return is not signed by him as the law requires. (Nos. 100 and 101, pages 19 and 20 of the record.)

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The tract of 1200 acres and the tracts of 46, 113 and 1281 acres, under which the defendants claim, so far as they interlock with the 1200 acres, are correctly located on the map of W. R. Graham, surveyor in this cause, printed in the record.

Defendant's Title.

Defendants claim title to that part of the 1200 acres which was involved on the trial under consideration, under deeds made by Henry C. Auville, Commissioner of School Lands of McDowell County in 1884 and 1885. The proceeding by Auville, Commissioner of School Lands, was begun in the Circuit Court of McDowell County July 7th, 1882, upon a report from said Commissioner that there was a tract averred to contain about 5000 acres of land, which was waste and unappropriated. From this report the Court directed the Commissioner of School Lands to proceed against said land in order that it might be sold for the benefit of the School Fund in the manner required by law. Subsequently, in the course of that proceeding, the Commissioner was directed to sub-divide said tract and after said sub-division to sell same. He did sub-divide the tract and sold, among others, to J. W. Harman the 46 acres designated on the map by the letters T D Q R T; to William R. Belcher 113 acres, which is designated on the map by the letters I J K L M N so far as it conflicts with the 1200 acres, and to Strahley, French and Welch a tract, which was first reported as 600 acres, but on a survey was afterwards found to convey 1281 acre,s which is designated on the map, so far as it conflicts with the 1200 acres by the letters D E F N M L K J I S R Q D. The deed to Harman is dated June 2nd, 1885. (Record page 21). The deed to Belcher is dated April 12th, 1884. (Record page 23.) The deed to Strahley, Welch and French is dated April 11th, 1884. (Record page 24.)

The plaintiffs, Eliza T. Fay and William Fay, were not parties to the said proceedings of Henry C. Auville, Commissioner of School Lands, against said waste and unappropriated lands and had no notice or knowledge of said proceedings. All the title which

Harman, Belcher and Strahley, French and Welch acquired by these deeds has passed by mesne conveyances from them to the defendants, the Trustees of the Crozer Land Association, for value and by regular conveyance. These three tracts of 46, 113 and 1281 acres were conveyed by the original grantees, Harman, Belcher, Strahley and others to Samuel A. Crozer, and he conveyed them to the Trustees of the Crozer Land Association. Before he conveyed them to said Trustees he made two coal leases, embracing these and other lands; one dated December 12th, 1887, to the Turkey Gap Coal & Coke Company, which lease contained within its bounds a part of the 1200 acres, as shown on Graham's map; the other dated December 16th, 1887, to the Houston Coal & Coke Company, which also contained within its boundaries a part of the 1200 acres, as shown on said map. Both of these leases contained other lands outside of the 1200 acres, and their openings for coal mines were made on other lands outside of the 1200 acres. During the life of these leases, commencing as far back as 1887, these lessees have cut timber upon the land in controversy on this trial continuously up to the present time. No permanent structures were built upon the land in controversy until 1894, or 1895, when a fan and two houses were built at the point marked by the letter X on the map. Entries had been driven from the adjacent lands underneath the surface of this land in controversy to the point X, where an opening was made in 1894 or 1895 for ventilating purposes, and some coal has since those dates been taken out only for the purpose of running the fan at the letter X and for domestic use at the two houses near the fan. The coal, which has been mined and shipped from the mines commercially, was taken out through openings outside of the land in controversy—outside of the 1200 acres, but within the boundaries of the leaseholds of said coal companies. These acts of possession by the lessees of the Crozer Land Association were done under a claim of title derived from the deeds from Henry C. Auville, Commissioner of School Lands above mentioned, and the intermediate deeds under which the defendants claim, and such possession as the said tenants had was adverse to the plaintiffs and to all the world.

The land was wild and uncultivated up to the time these acts of possession began and never was in the actual possession of the plaintiffs, or anyone claiming under them.

## QUESTIONS INVOLVED.

Upon this state of facts, it is claimed on behalf of the plaintiffs:

First: That they have the elder and best title, being the grant from the Commonwealth of Virginia to Eliza T. Fay and Samuel W. Austin for this 1200 acres, dated January 3rd, 1860.

Second: That this grant vested in Eliza T. Fay the full, complete estate in fee simple in an undivided one-half interest in said 1200 acres, and by virtue of his marital rights, her husband became entitled by the courtesy initiate to a life interest in her said one-half interest.

Third: Neither of the plaintiffs, Eliza T. Fay or William Fay, have ever conveyed away, sold or disposed of their interest in said land or voluntarily done any act to divest themselves of their title thereto.

Fourth: It is claimed on behalf of the plaintiffs that the proceedings by Henry C. Auville, Commissioner of School Lands, in 1882, against these lands and others as waste and unappropriated is void and of no effect as against these plaintiffs, because said lands were not waste and unappropriated, and belonged to the plaintiffs under the said grant from the Commonwealth. The term "waste and unappropriated lands" in Virginia and West Virginia means lands which have never been granted by the Commonwealth of Virginia or the State of West Virginia to any person. These lands, therefore, were not waste and unappropriated so far as they lie within the boundaries of this 1200 acres.

Fifth: That this 1200 acres had not been forfeited to and did not belong to the State of West Virginia and was not liable for sale as forfeited or delinquent lands in 1882, when said proceedings were carried on, and that, therefore, the defendants had no legal or valid title to said lands as against the plaintiffs.

## DEFENDANTS' CLAIMS.

On behalf of the defendants, it is claimed:

First: That because this tract of 1200 acres was not assessed for taxes between the date of the grant in 1860 and the year 1865, that they became forfeited to the State under the statutes then in force.

Second: That by the Sheriff's sale in October, 1869, of these lands for the delinquent taxes of 1865, '66, and '67 and '68 and the purchase of them at said sale by the State of West Virginia and the failure of the plaintiffs to redeem them from said sale within the year allowed by the statute, the lands became forfeited to and vested in the State of West Virginia.

Third: That even if this tax sale is not valid so as to divest plaintiffs of their title, still said lands became forfeited to the State of West Virginia by reason of the non-entry of them by the plaintiffs on the land books of McDowell County in the name of Eliza T. Fay after the year 1869 and up to the trial, and that by virtue of section 6 of article 13 of the Constitution of West Virginia, the title of the State thus acquired by forfeiture has been transferred to and vested in the defendants.

## PLAINTIFF'S COUNTER-CLAIM.

As against these claims of the defendants, the plaintiffs assert:

(a) That the facts do not show a forfeiture of the lands for non-entry prior to 1865.

(b) That the tax sale of 1869 was void and passed no title.

(c) That no forfeiture took place by reason of the failure of the plaintiffs to enter the land on the land books after the void tax sale of 1869, because the law required the assessor to leave them off the books, and the State can claim no forfeiture because of this complance with her own statute.

(d) That in as much as Mrs. Eliza T. Fay has been a married woman under coverture during all these years, her title has not been forfeited under the facts of this case and the law applicable thereto. Even if the provision of the statutes and constitution

of West Virginia for the forfeiture of land for non-entry on the land books for taxation is valid.

(e) But the plaintiffs contend that section 6 of article 13 of the constitution of West Virginia, as interpreted by the Supreme Court of Appeals of said State, is unconstitutional and void because it violates the 14th amendment of the Constitution of the United States and deprives the plaintiffs of their property without due process of law.

(f) On behalf of the plaintiffs, it is further contended that there has been no such adverse possession by the defendants, or those under whom they claim, of these lands as to constitute a defense to this action; that whilst the statute of limitations generally applicable to actions of this kind in West Virginia is ten years in favor of one holding by adverse possession, yet in the case of a woman who was married prior to 1869, when the present Code was adopted, the limitation is twenty years, and the possession of the defendants, according to the most extreme claim, had not run longer than fourteen years prior to the bringing of this suit.

## DISCUSSION OF QUESTIONS INVOLVED.

We will endeavor to take up these different questions and discuss them in their order.

### The Plaintiff's Title is the Oldest and is Regular in all Respects.

In Virginia and West Virginia the Commonwealth is the source of the title to all land. In the case of the *State* v. *Lumber Company,* 64 W. Va. on Page 696, Judge Poffenbarger delivering the opinion of the Court uses the following language:

> "Where does that title come from? There never was but one true title to any piece of land. Originally that was vested in the State and she granted it to a private person. Except by purchase, forfeiture or some other means it never gets back into the State, and it must remain in the hands of the person to whom it was granted, or some person claiming under him mediately or immediately."

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The State originally was the owner of all the lands and she established a system by which these lands were sold and granted under certain regulations. The form of the grant is found on page 16 of the record. First, the party desiring to take up any of the waste or unappropriated lands of the State purchased a treasury warrant for a certain amount per acre; by virtue of this warrant, he had a survey made, and this survey was submitted to the Register of the land office and if the land had not been previously appropriated, or still belonged to the State, a grant or patent was issued for it in the form shown on page 16 of the record. For a full account of the law governing the granting of lands by the Commonwealth see 2 Lomax Digest 379 (margin.) In the opinion delivered by his Honor, Judge Dayton, which is printed in the record, pages 42 to 57 inclusive, he quotes from the brief of counsel for the defendants the statement that these grants were made upon condition that the grantee would promptly pay any tax which might be laid upon the land. If his Honor meant to say that there was any such express condition attached to the grants by the Commonwealth we beg most respectfully to challenge this statement. These grants conveyed the full and free fee simple title. Of course the owner of the lands, just as the owner of all property, held it subject to taxation for the benefit of the government and to any reasonable and legal regulations that might be made for the collection of such taxation, but there was no condition, express or implied, in the grant that the land should revert to or become forfeited to the State for failure to make prompt payment of taxes.

In this case, Eliza T. Fay and Samuel W. Austin purchased from the State of Virginia 1200 acres of land, had a survey made of it and it was granted to them under the seal of the Commonwealth on the 3rd day of January, 1860. The plaintiff, Mrs. Eliza T. Fay, was one of the original grantees or patentees of this land. She has never sold, conveyed or agreed to convey her interest in this land to any one. She has not divested herself of the title by any voluntary act of her own.

The defendants' title does not begin until 1884, when those under whom they claimed obtained deeds from the commissioner of school lands for portions of these lands on the theory that they were waste and unappropriated and had never been previously granted by the Commonwealth of Virginia. It is clear that these were not waste and unappropriated lands. They had been previously granted by Virginia to Eliza T. Fay and Samuel W. Austin. So far then as the record title, derived from the Commonwealth of Virginia, is concerned, the plaintiff, Eliza T. Fay, has an older and better title to these lands than the defendants. This much is clear.

The defendants do not claim under deeds from Mrs. Fay, nor that their title is derived through her. Their claim is not under and by virtue of the patent issued to Mrs. Fay and Austin in 1860, but their claim is founded upon the theory that the lands had never been granted and were liable to be sold for the benefit of the school fund under the present system in West Virginia, and were so sold and purchased by them, and in that way they got a title from the State. Such a title is manifestly invalid and of no effect so long as Mrs. Fay's title continued valid and effective in her. The vital question then in this case is whether she has ever been divested of her title to this land. If she has, she cannot recover in this action, whether the plaintiffs have any title or not, because being plaintiffs in ejectment under our West Virginia cases she must recover on the strength of her own title, not on the weakness of the title of her adversaries.

By the introduction of the patent to her, she makes a *prima facie* case and it then falls to the defendants to show that she has lost her title in some legal constitutional way. The defendants claim that her title has been lost by tax sale and by forfeiture because she failed to have it entered for taxation on the land books of the County.

## MRS. FAY'S TITLE NOT LOST BY ADVERSE POSSESSION.

The plaintiff makes a *prima facie* case by introducing the grant to her from the Commonwealth of Virginia in 1860. Unless the

defendants can show an outstanding title, either in the state or themselves (through forfeiture,) or that the plaintiff is prevented from asserting this title, by the statute of limitations, she is entitled to recover. Before discussing the question of forfeiture, we shall notice briefly the question of the defendant's possession, and the statute of limitations.

From the agreed facts it appears that Mrs. Fay was a married woman on the 3rd day of January, 1860, when the patent of twelve hundred acres issued to her and Austin, and that she has continued to be the wife of the same husband, the plaintiff, William Fay, to the present time. By this patent Mrs. Fay did not acquire "sole and separate property," but the old common law estate, and her husband, immediately upon the grant, became entitled to curtesy initiate. The West Virginia statute creating the married woman's sole and separate estate did not go into operation until April 1, 1869, and it had no effect on Mrs. Fay's estate in this land.

The ordinary period of limitation for the recovery of real estate in West Virginia is ten years. The Statute is as follows:

> Sec. 1, ch. 104 of the Code of West Virginia (sec. 3493 Annotated Code.) "No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims."

> Sec. 2, ch. 104 of the Code of West Virginia, (sec. 3494 Annotated Code.) "No continual or other claim upon or near any land shall preserve any right of making an entry or bringing an action."

Section 3, Chapter 104, of the Code, (Sec. 3495 Annotated Code.)

> "If, at the time at which the right of any person to make an entry on, or bring an action to recover, any land, shall have first accrued such person was an infant, married woman, or insane, then such person may, notwithstanding said

period of ten years, shall have expired (except in the case of a married woman, where such land is her sole and separate property,) make an entry on, or bring an action to recover such land, within five years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall have first happened.

4. The preceding section is subject to these provisos: That no such entry or action shall be made or brought by any person, who, at the time at which his right to make or bring the same shall have first accrued, shall be under any such disabilities, but within twenty years next after the time at which such right shall have first accrued, etc."

This statute was construed in *Cooey* v. *Porter,* 22 W. Va. 120, and *Merritt* v. *Hughes,* 36 W. Va. 356, and in other cases.

It will be noticed that under the language of the above statute, the exception extending the period to twenty years does not apply to a married woman where her land is her sole and separate property. It has been held that where land was conveyed direct to a married woman, prior to the adoption of the West Virginia Code of 1869, which created the separate property of married women, her title does not constitute what is known in the law as her sole and separate property, but that she held the same under the common law estate recognized as belonging to a married woman, prior to the adoption of the modern statutes. This land, therefore, having been granted and conveyed to Mrs. Fay, prior to 1869, did not constitute her sole and separate property within the meaning of this statute, but was held by her under the common law and therefore the exception in the statute applies and *the period of limitations is twenty years.* These cases of *Cooey* v. *Porter,* 22 W. Va. 120, and *Merritt* v. *Hughes,* 36 W. Va., 356, and other cases make this clear. We do not understand that the defendants dispute this proposition. There is therefore no question but that Mrs. Fay had twenty ears within which to bring this action of ejectment after the land had been taken possession of by the defendants under adverse claim. Now there is no pretense of possession in the de-

fendants or those under whom they claim prior to the making of the coal leases in 1887, and in fact, there was no actual, adverse possession by occupation until 1894, when the opening was made at the letter X on the map and two houses and a fan were erected there. But, taking the extreme claim of the defendants, there was no possession of any kind until 1887. See paragraph 15 of the agreed statement of facts. This action was instituted by service of the declaration on the defendants on the 22nd day of March, 1901. The defendants' possession had therefore existed not more than fourteen years at the time this action was brought. *Mrs. Fay, therefore, is not barred by the statute of limitations. This much is clear also.* This defense was not seriously urged by the defendants at the hearing in the Circuit Court and we presume will not be in this Court.

## WAS MRS. FAY'S TITLE FORFEITED TO THE STATE?

It was argued by defendants' counsel that Mrs. Fay's title to the land in controversy was forfeited to the State of West Virginia for the following reasons:

1. Because this land was not entered upon the proper land books of Virginia and West Virginia for taxation for the five successive years of 1860 to 1864, both inclusive;

2. Because the land in controversy was sold in October, 1869, by the Sheriff of McDowell County, for the non-payment of taxes assessed thereon in the name of Fay and Harman, for the years 1865-6-7-8, and was purchased by the State of West Virginia; and because said land was not redeemed from the state within one year after such sale;

3. Because said land was omitted from the land books of McDowell County for the year 1870, and subsequent years, in the name of Fay and Harman, and has thereby become forfeited for non-entry for five successive years since 1870. We shall notice each of these contentions in the order named.

## THE FAY TITLE NOT FORFEITED FOR NON-ENTRY PRIOR TO 1865.

At the time the twelve hundred-acre tract was patented to Fay and Austin, to-wit, January 3, 1860, it lay in Tazewell County, Virginia.

The law then in effect relating to the assessment of lands for taxation is found in chapter 35 of the Code of Virginia of 1860. Section 6, chapter 35, provides that the clerk of the court of every county and corporation shall annually make out a list of all deeds for the partition and conveyance of land which may have been lodged in the clerk's office of such court to be recorded, *"within the year ending on the 31st of December preceding."*

Section 10 of the same chapter provides:

> "An abstract shall be made out for each county or corporation of all grants issued from the land office within the *year aforesaid* for lands therein. The register shall direct every such abstract to the commissioner of the revenue for the county or corporation, etc."

Section 19 provides that the assessor shall enter on his land book and assess the value of all lands in his district appearing by the register's abstract to have been granted.

It is plain, under these statutes, that the twelve hundred-acre tract became assessable for the first time in the year 1861. It was granted in January, 1860. It was the register's duty, in January, 1861, to send to the assessor an abstract of all grants issued from the land office within the year, ending on the 31st day of December, 1860. The Fay-Austin twelve hundred acres could not, therefore, have gotten upon the land books of Tazewell County, Virginia, before the year 1861. According to the agreed facts this twelve hundred acre tract was assessed to Eliza Fay and E. F. Harman upon the land book of McDowell County, West Virginia, for the year 1865. Therefore, in 1865, it had been omitted from the books for four years for which it was assessable under the law, namely, 1861-2-3-4. It was not contended that the omis-

sion of lands from the assessor's books for a less period than five years worked a forfeiture under the statutes of Virginia and West Virginia in force at this period. Defendants' argument was that this tract was assessable for the year 1860 because it was patented prior to April 1st. If this tract was not assessable for 1860 then it cannot be forfeited for non-entry prior to 1865. It is clear under the statutes above quoted that the first taxes chargeable upon this land to the plaintiff were those for the year 1861; that this tract had been omitted from the land books for only four years prior to the year 1865, when it was assessed to Fay and Harman; and that non-entry for less than five years did not work a forfeiture of the plaintiffs' title. This seems to be perfectly clear.

Upon this point Judge Dayton, of the Circuit Court, found for the plaintiffs.

THE SALE OF THE FAY LAND TO THE STATE BY THE SHERIFF OF McDOWELL COUNTY IN OCTOBER, 1869, WAS VOID AND THE STATE ACQUIRED NO TITLE BY IT.

Section 34 of chapter 30 of the Code of West Virginia, 1869, (which went into effect April 1, 1869) provides that the sheriff shall make out a list, in the form prescribed by that section, of real estate purchased by him on behalf of the state for the taxes thereon; then follows: "The officer making out the said list shall make oath that it contains a true account of all the real estate within his county purchased by him for the state during the year ———, and return the list, with a certificate of the oath attached, to the recorder of the county court within ten days after such sale, who shall, within twenty days after such return, make an accurate copy thereof in a well bound book, and transmit the same to the auditor."

The plaintiff has filed in evidence certified copies of the list of real estate in the County of McDowell sold in the month of October, 1869, for the non-payment of taxes thereon for the years 1865-6 and purchased for the State of West Virginia, and a copy of a like list of real estate sold at the same time, October,

1869, for the taxes of 1867-8, both of which copies are certified by the Clerk of the County Court of McDowell County. (See Exhibits 100 and 101 with the Agreed Facts.)

It appears that the 1200 acres, Clayborne Ridge, assessed to Eliza Fay and E. F. Harman for the years 1865 to 1868 inclusive, is contained in both of these lists.

From an examination of the copies above mentioned, and each of them, it will be seen that *the recorder of McDowell County did not note on said lists of sales to the state the day in which the sheriff returned the same to his office,* and the clerk certifies that the record relating to said sales in his office does not show when these lists were returned by the sheriff to the recorder's office.

(2) It further appears that the form of affidavit of the sheriff attached to said lists is not dated. There is nothing to indicate when these lists or either of them were returned to the recorder's office.

(3) It will further appear from an examination of the form of certificate attached to said lists that this form of certificate was not signed by the sheriff. It runs:

> "I, Smith Trent Sheriff of the County of McDowell, do swear etc., . . . . . so help me God,
>
> P. LAMBERT, *Justice of Sandy River Tp., McDowell Co., W. Va.*"

The only signature to this affidavit is that of P. Lambert, Justice.

It has been held in a long line of decisions, both State and Federal, that it was the official duty of the recorder to record in his office the day on which the sheriff returned to his office the former's lists of sales of land for delinquent taxes. And that the record of such sales in his office must affirmatively show this. And if the recorder fail to make such note so that the record in his office does not show when such list was returned by the sheriff to the recorder's office this omission is such a fact appearing on the face of the proceedings of record in the office of the recorder as renders invalid any sale made by the sheriff shown upon said list whether to an individual or to the State.

*Barton* v. *Gilchrist,* 19 W. Va. 223.
*Simpson* v. *Edminston,* 23 W. Va. 675.
*McAllister* v. *Cottrille,* 24 W. Va. 174.
*Wakeman* v. *Thompson,* 32 W. Va. (Appendix) Opinion of Judge Jackson of U. S. Circuit Court.
*Sayers* v. *Burkhardt,* 29 C. C. A. 137.
*Cook* v. *Lasher,* 19 C. C. A. 654. (See Record) 85 Fed. 246.
*DeForrest* v. *Thompson,* 40 Fed. 375.

In *Simpson* v. *Edminston,* about quoted, the certificate of the sheriff's oath to the lists of sales was dated on the 10th day after sale.

The Court says:

> "An inspection of said return of the sheriff to the list of sales fails to disclose when it was returned to the office of the clerk of the county court . . . . . it nowhere appears from any note or memorandum of the clerk or otherwise that said list of sales was returned to the clerk's office within ten days, nor does it show when it was returned in any other manner."

The Court held in that case that the sale of the plaintiff's land was invalid and set aside a tax deed made in pursuance of such sale.

In *Cook* v. *Lasher,* above cited, the Circuit Court of Appeals, Judge Paul, affirming the decision of Judge Jackson held:

> "Failure of the sheriff to make out and return within ten days a list of the lands purchased on behalf of the state as required by statute (Code of West Virginia, chapter 31, section 31) renders the tax sale null and void. *DeForrest* v. *Thompson,* 40 Fed., 375, approved."

In *Wakeman* v. *Thompson,* Judge John J. Jackson, of the United States District Court for the District of West Virginia, held a sale of land to the state was void (first) because the sheriff failed to return his list of land sold as delinquent for taxes within ten days after the sale and purchase of them by the state, and

(second) because the recorder failed to note the time when the sheriff returned his list of sales.

The sale under consideration was made in 1871 for the taxes of 1869-70. The same law was in effect at the time this sale was made (1871) as at the time the attempted sale of the Fay lands was made (1869) by the Sheriff of McDowell County. There can be no escape from the conclusion that the attempted sale of the Fay land to the state of West Virginia in October, 1869, was invalid and void, and that the state acquired no title, under the rulings of the State Court and of the U. S. Court, in the cases above cited.

The recent decisions of the Supreme Court of Appeals of West Virginia have been conflicting and even contradictory as to many points, so that the law in the State Courts in regard to certain questions in connection with tax proceedings is unsettled and in confusion, but none of these recent decisions have attacked or changed the rule laid down in the cases above cited, invalidating sales made prior to the passage of the curative act of 1882 for the failure of the sheriff to return his lists of sales to the clerk's office within ten days.

In *State* v *McEldowney*, 54 W. Va. 695, it is held:

> "The curative provisions as to tax sales in section 25, chapter 31, Code of 1899, apply to purchases by the state of land sold for taxes. Point 3 of the syllabus in *McGee* v *Sampselle*, 47 W. Va., 352 to the contrary is overruled."

This curative provision of section 25 of chapter 31 of the Code is first found in chapter 130 of the Acts of 1882. In *State* v. *McEldowney* the Court had under consideration a purchase by the state of land sold by the sheriff of Wetzel County in July, 1901, long subsequent to the passage of said curative act. It had previously been decided in several cases where land had been sold to individuals and a tax deed obtained by the purchaser, since 1882, that said act cured the defect arising from the failure of the sheriff to return his list of sales within ten days.

*In the case of State* v. *Harman*, 57 W. Va. 447, the question

came squarely before the Court as to whether the curative act of 1882 applied to sales made prior to its passage, whether it was retro-active. Point 5 of the syllabus reads:

> "Sections 25 and 53, chapter 31, Code of 1889, are not retro-active. They do not cure void tax deeds made prior to the enactment of the provisions therein." See page 454.

It is clear, therefore, that both under the law as it stood in 1869 and as it stands today as announced in the decisions of both the State and Federal Courts, the attempted sale of the Fay land to the State of West Virginia for the taxes of 1865, 6, 7 and 8 was void; that the state acquired no title and that said land would not become subject to forfeiture and proceedings by the Commissioner of School Lands on account of said sale.

Judge Dayton, found for the plaintiffs on this point also.

## THE FAY-AUSTIN 1200-ACRE TRACT NOT FORFEITED FOR NON-ENTRY ON THE LAND BOOK OF McDOWELL COUNTY IN THE NAME OF ELIZA FAY ET AL. AFTER 1896.

The last entry of this land on the books in the name of Eliza Fay was in the year 1869, since which year it has been omitted from the books in her name. The question arises, why was the tract of 1200 acres dropped from the land books in 1870 and never afterwards re-instated on said books. As before shown, the sheriff had sold this tract in October, 1869, and purchased it for the State of West Virginia. By section 23 of chapter 29 of the Code of West Virginia of 1868 (Acts, 1863, section 19, page 157), it was provided: "Real estate purchased for the state at a sale for taxes *shall not be thereafter entered in the land book*, but the auditor shall keep a register thereof." This statute was construed and its effect stated in several cases, both state and federal. The following quotations are taken from Judge Goff's opinion in the case of *Sayers* v. *Burkhardt*, 29 C. C. A. 137:

> "The next assignment of error relates to the finding of the court below that the complainants had title to the 17,-850 acres claimed by them in their bill, appellants insisting this was error for the reason that the record shows complainants' title to the same had been forfeited to the State of West Virginia for non-entry upon the land books for taxation for the years 1877 to 1881, inclusive. But it is apparent from the record that the land could not have been forfeited for non-entry for those years for the reason that the same was purchased by the state at a tax sale in the year 1877, and could not therefore lawfully be upon the land books for the said years, as the statute relating to that subject requires that land so sold shall not thereafter be entered for taxation unless redeemed."

The Court was considering in this case a *void* sale to the State. The printed record (pp. 109-114) shows that the tax sale of 1877 referred to in Judge Goff's opinion was void on exactly the same ground pointed out in the case at bar, namely, the failure of the sheriff to return the report of sale within the time required by law. The two cases are similar in all respects.

Point 2 of the syllabus of the Burkhardt cases reads:

> "Where lands have been purchased by the state at tax sale they can not be forfeited for non-entry on the land books for taxation, under the statute of West Virginia, which provides that land so sold shall not thereafter be entered for taxation unless redeemed."

In *Totten* v. *Nighbert,* 41 W. Va. 800, point 4 of the syllabus reads:

> "Where land has been sold for taxes and purchased for the state and the clerk of the court illegally places such land on the land books for succeeding years in the former owner's name and such land is again delinquent and sold by the direction of the auditor for the taxes of such succeeding years, such sale is illegal and void, and the purchaser acquires no title by reason thereof, and the clerk's deed made in pursuance of such sale is wholly void and will be set aside."

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The syllabus above quoted, from *Totten* v. *Nighbert*, is affirmed and approved in *State* v. *Belcher*, 53 W. Va. 359.

And the decision in *Sayers* v. *Burkhardt* is referred to in the opinion of Judge Brannon in *State* v. *Jackson*, 56 W. Va. 558, at page 574, as sustaining the proposition that land can not be forfeited for non-entry after a *void* sale to the state, though this point was not decided, as follows:

> "For Ritter it is contended in answer to the claim that Lansberg's title was transferred to the Jackson-Harrison title; that the tax sale in Lansberg's name to the state in 1869 is void, and vested nothing in the state because the sale was *not returned* to the clerk's office within ten days and because no note of its return was made in that office, and because the sheriff's affidavit was not *signed* by him, and because the affidavit was not sworn to. *McAllister* v. *Cottrille*, 24 W. Va. 173. As to forfeiture for omission after the purchase by the state it is answered for Ritter that the law forbade the charge of any land after its purchase by the state and that this would prevent the forfeiture for non-entry, and for this position counsel for Ritter rely on *Sayers* v. *Burkhardt*, 29 C. C. A. 137, 85 Fed. 256. As these matters are being considered in another case before the Court, and are not necessary for the decision of this case, though pertinent to it, for the reason that the Jackson-Harriton land clearly did not pay taxes for five years after 1865 so as to claim the benefit of the forfeiture of the fifty thousand acres, if forfeited it was."

But the question of the effect of non-entry after a void sale to the state came before the Court in the case of *Stockton* v. *Craig*, 56 W. Va. 464, in which Judge Dent, delivering the majority opinion, puts an entirely different construction upon section 23 of chapter 29 of the Code of West Virginia of 1868, (which though amended and re-enacted, is contained in the Code of 1899 in practically the same form), which provided that real estate purchased for the state at a sale for taxes should not be entered on the land book, from the construction given to that statute by the U. S. Court and the Circuit Court of Appeals for the Fourth District in the case of *Sayers* v. *Burkhardt*, and

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the construction given to the same statute by the State Court in *Totten* v. *Nighbert* and other cases above referred to. The learned Judge in this case asserts the proposition that said section 23 of chapter 29 applies only to valid sales to the state, not to sales which are void for irregularities; that the clerk and assessor are judicial officers who must decide whether any given sale is valid or void; that they, as well as the land owner, are presumed to know the law and presumed to know when a sale is irregular and void; and if, after a sale to the state the clerk and assessor obey the plain mandate of the statute and omit the land sold from the land book for succeeding years, it should be determined that such sale was void on account of irregularities, or otherwise the owner's land becomes forfeited if left off the land books for five successive years. Judge Dent concedes that the owner's land would not be forfeited for non-entry after a valid sale to the state however long it may have remained off the books, but he holds that forfeiture will occur for non-entry after a void sale. He therefore makes the decision of the clerk or the assessor, or the land owner upon an intricate legal question as to which courts are not in harmony, determine the matter of the forfeiture or the preservation of the owner's title. Judge Brannon states in a note made part of the opinion filed in the case that he can not concur in Judge Dent's views on this point. At page 472 Judge Dent refers to the Sayers-Burkhardt case and the Totten-Nighbert case and argues that the decision in these cases do not apply where the sale to the state is void. This is clearly incorrect and untenable. As heretofore shown, the sale in the Burkhardt case was void for the same reasons that the sale of the Fay lands is void.

And Judge Brannon says:

> "But I am not as yet ready to hold that when land is sold to the state for delinquent taxes, even where the sale is void for irregularity, that its non-entry on the tax books after such sale will work its forfeiture. Section 23, chapter 29, Code provides that real estate purchased for the state at a sale for taxes shall not be thereafter entered on

the land books, but the auditor shall keep a register thereof. Here is a positive prohibition against the entry of such lands on the tax books, and I can not see how the owners can be remiss to the extent of the forfeiture of their land. They can redeem and re-assess. We can not say that if not re-entered for taxes the owners cheat the state out of her taxes as the land is hers, and she can sell it and take all its proceeds if she chooses to deny them the excess of her taxes and interest and damages; and under the statute as they are, on redemption or sale, she gets back all her taxes with twelve per cent. interest. She can lose nothing. The land is hers and not taxable. *State* v. *McEldowney*, 54 W. Va. 695; *State* v. *Belcher*, 53 Id. 359; *Totten* v. *Nighbert*, 41 Id. 800. In *Sayers* v. *Burkhardt*, 85 Fed. 246, 29 C. C. A. 137, it was held that: 'Where lands have been purchased by the state at a tax sale they cannot be forfeited for non-entry on the land books for taxation, under the statute of West Virginia, which provides that land so sold shall not thereafter be entered for taxation unless redeemed.' But it is said in this case that, where a tax deed is void for irregularities, it is the duty of the clerk or the assessor, on request of the owner, to restore the land to the tax books, and that that owner must cause him to do so by request or mandamus. I cannot see clearly as yet that in the face of a statute prohibiting the assessment of such land a clerk or assessor can assume the function of passing upon the validity of the tax sale, generally a most intricate and delicate question of law, and thus exercise judicial functions. The sale is colorable, its validity colorable, and I can not see how it can be overthrown by the clerk or assessor."

The Court will note that Judge Brannon cites the cases above referred to, as sustaining his view that section 23 of chapter 29 applies to all sales made to the state, whether valid or void. If that had been a *valid* sale to the State, she would have taken title to the land by that sale, and there would have been no necessity to claim that she got her title by the failure to enter lands after the sale. The very fact that the State claimed title on account of the non-entry, shows that her previous purchase was void. We repeat, moreover, that the record in the Burkhardt case shows that the Court had then before it a sale to the state which

was void beyond all controversy, and recognized as void. The construction above given the statute by Judge Brannon, and by Judge Jackson and Judge Goff, had been long recognized and acted upon by the bar and the trial courts, state and federal. This construction of the statute became a rule of property. Judge Dent questioned it for the first time, and sought to overthrow it, in the Stockton case.

It appears from the record in the Burr-Wakeman case, 32 W. Va., Appendix, decided by Judge Jackson in 1889, that the plaintiff's land had been omitted from the land books for five successive years after a void sale to the state. Notwithstanding the non-entry of the plaintiff's land for five years after such void sale, Judge Jackson held that the plaintiff's title was not divested and forfeited to the state for non-entry, and that, as the owners of the said lands, the plaintiffs were entitled to the relief prayed for against the defendants, namely, the annulling of certain deeds under which the defendants claimed title to these same lands through commissioner of school lands proceedings.

Several years later, *Sayers* v. *Burkhardt* arose, and the same question, the effect of non-entry after a void sale, was presented, and the able counsel for the plaintiff impressed successfully upon the court the point that the Wakeman case had held that there could be no forfeiture for non-entry after a void sale, and that this doctrine had been recognized by the profession as sound law, and that it should not be disturbed. We cannot do better that to quote from counsel's brief for Sayers on this subject:

> "Under the carefully considered decisions of this Court in the cases of Burr Wakeman, 32 W. Va. Appendix, and Francis Lasher et al., Trustees, *vs.* John W. McCreery, et al., decided February 25, 1895, the purchase by the state of the Burkhardt lands at the tax sales made in 1875 and 1877, were invalid, it not appearing when the return of the sheriff was made to the clerk's office, and the sheriff having failed to make his return within ten days, as required by law.
>
> "The tax purchase by the state being invalid, there could be no forfeiture, therefore, for non-entry, because Sec. 23 of Chap. 29 of the Code commands the clerk to drop from the

land book all lands purchased by the state at a tax sale. This very question was presented and decided in the Burr Wakeman case. The lands of Burr Wakeman had been purchased by the state at a tax sale, and thereafter omitted from the land books for more than five years, and the defendants claimed that the yewre forefited on that account, but this Court held otherwise. Certainly the profession are justified in considering the Burr Wakeman case as law. That case was most elaborately argued a number of times and received the most careful consideration of the Court, and has always been regarded not only as the pioneer case, but the leading case in our courts on all the subjects embraced in it."

## IS THIS COURT BOUND BY THE MAJORITY OPINION IN STOCKTON *vs.* CRAIG?

It will be contended that although Judge Dent's opinion in the Stockton case may be contrary to that of Judge Goff in the Burkhardt case, still under Rev. Stats., Sec. 721, and the decisions of the federal courts construing it, this Court is bound to adopt the rule laid down by Judge Dent, as the latest expression of the State Court of last resort upon the construction of the state statute.

It is true that as a general rule the federal courts follow the state courts in the construction of state statutes, especially, those affecting the title to real property, or involving matters relating to taxation. But the federal courts will not follow every oscillation and shifting view that may occur in the state decisions. Where the State Court has put upon a statute a different construction from that given it by the same courts when the transactions in controversy occurred, the federal courts will act with practical independence, or even disregard, of the views of the local tribunal as to the validity, interpretation and effect of state legislation.

*Burgess v. Seligman,* 107 U. S. 20.

Nor can it be claimed successfully that the Stockton case decided in 1904, three years after this action was instituted, is a decision of the state court in pursuance of which property rights have been acquired. The doctrine of the Burkhardt case, announced in 1896,

that the statute meant what it said when it required the clerk to omit land sold to the state from the land books, had been recognized by the courts and the bar and by purchasers of West Virginia lands, as a rule of property in this state since the passage of the statute in 1863 and titles had been passed and lands bought and paid for accordingly.

There are suits now pending in the U. S. Court involving titles to lands which were bought in reliance upon that interpretation of that statute. A reversal of a decision like that in the Burkhardt case, in the light of which titles to valuable real estate have been *acquired,* is open to the same criticism as the retro-active construction of a statute affecting titles. For titles are no less affected by the reversal of a well settled and long recognized construction of a statute, giving it a different interpretation today from what it had when title was acquired, than titles would be by the passage of a statute today having a retro-active effect upon the same titles. The one is the retro-active act of the courts the other of the legislature. The injustice of giving a retro-active construction to a statute was pointed out by Judge Brannon in the case of *State* v. *Harmon,* 57 W. Va., at page 454, where it was sought to give the "curative act" of 1882 a retro-active effect, so as to remedy certain defects in sales of land made prior to its passage.

> "I cannot consent to the proposition that hundreds and thousands of tax deeds, void by the statutes in force when those deeds were made, can be made valid by after legislation, even if section 53 were in letter retro-active. My land is sold for taxes today. The sale and deed by the statute today are void, so that my title remains in me not impaired by the tax sale. Next year—or many years hence—an act is passed curing the defect in the tax sale, making the sale and deed good. Until that act my title was yet in me; I had a good defense against that tax deed; but that defense is taken from me, my land is taken from me."

If the Legislature of West Virginia had passed a retrospective act in 1904 validating tax sales, made in 1869, which were void under the law existing prior to such act, and had thereby subjected

Mrs. Fay's land to forfeiture when it would not have been forfeited but for such retro-active statute, it is clear under the decisions of the Supreme Court of the United States that the federal courts would not follow the state courts if the latter should give the statute such retro-active construction. But the defendants here ask the Court to overrule the decision of the Circuit Court of Appeals in *Sayers* v. *Burkhardt,* construing section 25 of chapter 31, and adopt a different construction of the majority of the State Court, promulgated in *Stockton* v. *Craig,*—decided since this case was brought—when the effect of such course would admittedly be to forfeit Mrs. Fay's title, when according to the construction given the same statute in the Burkhardt case Mrs. Fay's land is saved to her until the time prescribed by the statute of limitations shall have elapsed.

It is in just this class of cases that the federal courts exercise their prerogative to decide controversies between citizens of different states without being bound by a change of judicial construction given to a statute by the State Court.

In *Douglas* v. *County of Pike,* 101 U. S. 677, it appears that in 1868 the State of Missouri passed an act to facilitate the building of railroads pursuant to which certain bonds in suit were issued. The federal and state court both held this act constitutional. Subsequently the Supreme Court of Missouri held the act unconstitutional. It was insisted that the federal court was bound to follow this latest decision of the state court construing the state statute and to overrule its own former decision. But Mr. Chief Justice Waite, in refusing to follow the state court, said:

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say *make it prospective, but not retrospective.*" (Italics ours.)
>
> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decisions is to all intents and purposes the same in its effect on contracts as an amendment of

> the law by means of legislative enactment * * * We always regret to find ourselves in conflict with the courts of the states in matters affecting *local law*, but when necessary we can not refrain from acting on our own judgment without abrogating our constitutional jurisdiction." (Pages 686-7.)

The language of this decision refers to statutes discharging contract rights. But the principle on which the decision rests is as applicable to the construction given a statute by a state court which construction will destroy or forfeit land or other property as one which will destroy contract rights.

In *Rowan* v. *Runnels*, 5 How. 133, the Supreme Court of the United States followed a former decision of its own, construing the Constitution of the State of Mississippi, notwithstanding the state courts had, since that decision, put a different construction upon the clause of the Constitution in question, and it was argued that the federal court should follow the highest state court.

In this case it appeared that the Supreme Court of the United States had decided, in *Groves* v. *Slaughter*, 15 Pet. 449, that the Constitution of Mississippi did not of itself prohibit the introduction of slaves as merchandise. At the time *Groves* v. *Slaughter* was decided there was no decision of the state courts upon the point, one way or the other. Subsequently the state courts held that the Constitution of Mississippi did of itself prohibit the introduction of slaves as merchandise. The question was thus presented to the Supreme Court of the United States, in *Rowan* v. *Runnels*, whether it would follow its own decision or the subsequent decisions of the state court to the contrary. Mr. Chief Justice Taney held that the federal court could hardly be required by any comity or respect for the state courts to surrender its own deliberate opinion to decisions since made in the state, and that, while the federal courts felt themselves bound to respect the decisions of the state courts, still they ought not to give to such decisions a retroactive effect.

Applying this decision to the case at bar, we submit that this court should follow the deliberate opinion of the highest federal court having jurisdiction as expressed in the Burkhardt case rather

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than the subsequent retro-active decisions of the State Court to the contrary. It will be recalled that, at the time the Burkhardt case was decided, there was no decision of the State Court to the contrary of the holding of the Court in that case.

In the case of *Pease* v. *Peck*, 18 How. 595, the Supreme Court of the United States was called upon to say whether it would include in the statute of limitations of the State of Michigan the saving clause "beyond seas," which words were not found in the original manuscript of the statute, but which were included in the published laws and had been acknowledged by the people and recognized as a part of the statute, for a long time. The court held that by reception and long acquaintance these words had become part of the statute, and says, at page 598:

> "The only argument which has been urged, which could lead us to doubt the justness of this conclusion is,that the Supreme Court of Michigan have, it is said, come to a different decision on this question. We entertain the highest respect for that learned court, and in any question affecting the construction of their own lands, where we entertained any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, *many dicta* to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although they may be a correct yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of the State, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt t without criticism or further inquiry. But when this court have first decided a question arising under state laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a state court, as in the case of *Rowan* v. *Runnels*, 5 How. 139. When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions, and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent.

"See also *Douglas* v. *County of Pike,* 101 U. S., at page 686; *Jones* v. *Hotel Co.,* 86 Fed. 372; *National Foundry Co.* v. *Oconto Co.,* 68 Fed. 1009; *Wilson* v. *Ward Lumber Co.,* 67 Fed. 681."

In *Barnes* v. *Bee,* 138 Fed. 476, the recent decisions of the Supreme Court of Appeals of West Virginia, relating to tax sales, were reviewed and the conflict and confusion pointed out by the Circuit Court of the United States for the Northern District of West Virginia, and the inequitable trend of late decisions and legislation commented upon.

At page 482, the court says:

"It is sufficient for me to say, with the utmost respect and deference, that I have no sympathy for the purposes and objects designed to be accomplished by this section 25 (of chapter 31) and I am constrained to think that the Supreme Court of the state has gone much too far in construing liberally, if not enlarging, its scope, instead of construing strictly its provisions, as being contrary to common right and honesty. I fully appreciate the obligation upon federal judges to follow in an express comity the courts of the state touching its statutes, and I will certainly discharge this obligation as far as possible. Yet, in view of the conflict and confusion existing in the state court's decisions in this case, if it stood alone upon that point, I do not believe I would hesitate to set aside as void the sale and deed, etc."

We believe that the foregoing cases will serve to illustrate the exceptions, or, rather, the limitations, to the doctrine that the federal courts must follow the state courts upon questions depending upon the construction of state statutes. The cases show that, if the federal courts have once construed a statute, even if it relates to limitations, taxation, or other local matter, they will not be bound to disregard their own rulings and to follow subsequent decisions of the state courts construing the statute differently. When this condition is presented, the federal courts have uniformly exercised their prerogative of following and approving that construction of the statute, whether state or federal, which commends itself to the court as the legal and proper construction. We

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subimt that this court is not required to reflect in its decisions upon tax sales, in the cases which may come before it from time to time, all the inconsistencies of the decisions of the State Court upon tax sales; that this Court is not called upon to surrender its own judgment and to repudiate the judgment of the Circuit Court of Appeals because the State Court has subsequently decided the question at issue differently from these courts; and that this Court will not hold that the plaintiff's title to the land in controversy is forfeited by the action of the clerk and assessor in omitting her land from the books, in accordance with the mandate of the statute, because the Supreme Court of Appeals of West Virginia, in the case of *Stockton* v. *Craig* (which was followed in *Webb* v. *Ritter)* held that the statute requiring such omission, applied only to valid sales, and that the clerk or assessor must decide in each case whether the sale involved was valid or void,—the contrary view having been adopted by the federal courts for this circuit. See also the case of *Barton W. Kuhn* v. *Fairmont Coal Co.,* of West West Virginia, decided by U. S. Supreme Court at the present term.

We therefore take it that this court will, in this juncture, determine for itself whether the reasoning in *Stockton* v. *Craig,* and in*Webb* v. *Ritter,* or in *Burkhardt* v. *Sayers,* is the true solution of the question of the forfeiture of Mrs. Fay's title. And, in conclusion, on this branch of the case, we desire to call attention to the basis of Judge Dent's opinion so as to lay the matter before this court for its mature consideration as fully and as clearly as we can.

In the first opinion delivered by Judge Dent in this case of *Stockton* v. *Craig,* he took the ground that the curative act of 1882 was retro-active, not only as to sales to individuals, but as to sales to the state, and that therefore, although a sale to the state in 1870 was void under the law as it then stood, yet it became valid by virtue of the the provisions of the act of 1882, and he put his decision on this ground and overruled a number of the older cases. On the re-hearing which was granted, Judge Dent aban-

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doned his former position and did not insist that the act of 1882 was retro-active so as to make valid a former invalid purchase by the state, but took an entirely new position and sought to uphold the conclusion which he had previously arrived at by an entirely new course of reasoning.

The tone of his reasoning indicates a feeling in his mind that the plaintiffs ought not to be permitted to recover because of their long laches and neglect. This is the thought uppermost in his mind, and, in order to give effect to this feeling, he was evidently led into erroneous reasoning. He bases his last opinion upon those statutes which require the assessor and the clerk, when they have ascertained that there is any land in the district which has not been entered on the land books, or after being so entered, has for any cause been omitted for one or more years, to make an entry thereof, and of the name of the owner, and charge the same with all the taxes which should have been charged thereon.

> Acts 1875, Chapter 54, Section 10.
> Acts 1879, Chapter 73, Section 10.
> Acts 1881, Chapter 12, Section 10.

The invoking of this statute seems like an afterthought. It has manifestly no application to the matter in hand. It applies to lands that had been omitted previously without the knowledge of the assessor or clerk. The language is:

> "When the assessor shall ascertain that there is any land in his district which has not been entered in his land book, or, after being so entered, has for any cause been omitted for one or more years, he shall make an entry thereof, etc.

This clearly does not apply to a case where the Assessor has himself deliberately and purposely omitted the land from the land books in obedience to another statute. That other statute was section 23 of the same chapter 29 of the code of 1866 and reads as follows:

"Real estate purchased for the state at a sale for taxes shall not be thereafter entered in the land book, but the auditor shall keep a register thereof."

The two provisions are in the same chapter. The one required the assessor not to enter real estate purchased for the state, the other requires him to enter any lands which he shall ascertain have been omitted. They must be construed together, and clearly do not contemplate that the assessor, after deliberately omitting a tract in obedience to section 23, is afterwards to review his action under section 10. Judge Dent says that the assessor in such case was clothed with judicial powers often nominated quasi judicial. It is true that it is the duty of the assessor to ascertain what property was liable for taxation, and that this required the exercise of some judgment and discretion, but any party aggrieved by an assessment had the right to apply for relief to the county court or other tribunal. But suppose, in a case like this, the land owner has applied to the assessor to restore his land to the land books, and, after investigation, the assessor had concluded that the sale was legal and regular and refused to restore the land to the books, what remedy did the land owner have? He had no right of appeal to any other judicial tribunal; the county court could not review the action of the assessor in this respect; the Circuit Court could not compel him to act by mandamus against his judgment in the exercise of judicial functions; if the powers which he was exercising in passing upon the validity or invalidity of a tax sale to the state were judicial in their character, (and it is manifest that they were,) then all the circuit court could do by mandamus would be to require the assessor to act in such a matter. It could not tell him what decision to render; it could not by mandamus review a decision he had already rendered, and Judge Dent does not discuss this phase of the question at all—he simply says that either the assessor or the clerk had authority to restore these lands to the land books on application of the owners at any time before they became forfeited by reason of non-entry, provided the former purchase by the state was illegal or void for any cause,

and, having the power, it was incumbent upon them as a duty to do so when thereto requested. But he does not say what would be done in case they should refuse to do so.

To our mind it is clear that, in such case, the land owner would have no remedy; that his land would have to remain off the books after the clerk had declared that the sale was valid, and that he would have to wait until the commissioner of school lands instituted a proceeding under the statute for the sale of the land for the benefit of the school fund.

But it strikes us as almost ludicrous for the Supreme Court to hold that the clerk of the county court, or the assessor, is invested with judicial powers to pass upon the validity of a tax sale. The ability and ingenuity of the members of that Court of learned lawyers has been very often taxed to arrive at a satisfactory decision of the questions presented by these tax sales. They have been the most difficult questions with which the Court has had to deal in all its history. That Court itself has from time to time shifted its ground upon these very questions, and yet Judge Dent has solemnly decided that a poor, ignorant assessor, frequently unlettered, and certainly unlearned in the law, is, under our system of laws, vested with judicial powers and compelled to settle these intricate questions of tax sales.

And he quotes with approval the case of *Totten* v. *Nighbert,* 41 W. Va. 800, and *Sayers* v. *Burkhardt,* 85 Fed. 246, 29 C. C. A. 137. Judge Dent in his opinion, speaking of these cases of *Sayers* v. *Burkhardt,* and *Totten* v. *Nighbert,* says:

> These decisions are both in harmony with each other and the statutes which they construe, but do not in any sense sustain the plaintiff's contention that, if the sale to the state is void, the land cannot be restored to the land books on request of the original owner in discharge of the requirements of the constitution and statutes."

This statement shows how inaccurate the learned judge was in that opinion. An examination of the case of *Sayers* v. *Burkhardt* will disclose the fact that, in that case, there was a void sale to the

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state and that the land was, after such sale, left off the books for more than five years, and yet the court held that there was no forfeiture to the state, and the very questions that are involved in *Stockton* v. *Craig* were argued there, and the Court based its decision upon the statute which required the clerk to leave the land off the books after a sale to the state.

Judge Goff, in his opinion, uses this language:

> "Land will not be declared forfeited for non-entry in cases where the statute law provides that it should be omitted from the land books."

Now, what Judge Dent meant by saying that this decision was in harmony with the statute which it construed, and yet justified his conclusion that the lands which had been omitted after a sale to the state were forfeited, we do not know. Certainly that decision is not in harmony with his decision in *Craig* v. *Stockton*, and yet from his language one would infer that he intended to state that it was.

There remains to notice one interesting and anomalous consequence of Judge Dent's opinion in *Stockton* v. *Craig*, that section 19 of chapter 18 of the Acts of 1863, now embodied in section 10 of chapter 29 of the Code of 1899, gives to the assessor judicial powers and that under it he acts judicially in determining what lands shall be placed upon the land books, and as incidental to that power, he must determine the validity of tax sales.

It is one of the most elementary rules of law that a judicial officer shall not have a penalty imposed upon him, or suffer in damages for judicial acts, when done in the honest performance of his duties; and it could never be conceived that the Legislature would pass a law inflicting a penalty upon a judicial officer for exercising his judicial discretion in a certain way. Yet, if we understand the case of *Stockton* v. *Craig*, that is just what the Legislature of West Virginia has done. Section 19 of chapter 118 of the Acts of 1873, and amendments thereto, provides: "When the assessor shall ascertain that there is any land in his district that has not been entered on the land books, or, having been so entered, has for any

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cause been omitted for a period of less than five years, he shall make an entry thereof and of the name of the owner, and further states: "Any assessor failing to make such entry and deliver such certificate shall forfeit twenty dollars."

It is preposterous to conclude that the Legislature intended to say that the assessor should forfeit twenty dollars if he did not exercise his judicial discretion in a case like that at bar, in such a way as would result in entering the Fay tract upon the land books. If this be a proper conclusion, we are confronted with the anomalous situation of the Legislature clothing the assessor, an officer of its own creation, with judicial discretion, and then providing that he shall be punished and fined unless he exercises that judicial discretion in a certain prescribed way. It is not allowable to interpret the acts of the Legislature in this way.

From the foregoing we submit that the unbiased mind is driven to the conclusion:

First. That, independent of statute, the assessor has no judicial discretion other than the valuation of property for taxation;

Second. That the Legislature has not, by the act above mentioned, clothed the assessor with judicial power to determine the legality or illegality of sheriffs' sales and that it was never intended that the assessor should have the power to decide what lands should be omitted or entered on the land books.

Unless the plaintiff's title has been forfeited in one of two ways prescribed by our statutes, she is entitled to recover in this action. We have attempted to show that her title was not forfeited on account of the sale of her land to the state in 1869, because this sale was void. We have next attempted to show that plaintiff's title is not forfeited by reason of having been omitted from the land books since the year 1870, because the statutes then in force required that all lands reported by the sheriff as sold to the state should be omitted from the land books and proceeded against by the commissioner of school lands. In support of this latter position we have endeavored to point out the fallacies in Judge Dent's reasoning in *Stockton* v. *Craig*. Unless this Court is willing to subscribe to the

Stockton case and other cases which have since followed it, and repudiate the Burkhardt case, we submit that the finding should be for the plaintiff's on this question.

## NO FORFEITURE, BECAUSE MRS. FAY A MARRIED WOMAN.

But we insist that Mrs. Fay's title to one-half interest in this land has never been forfeited for the following reasons: She was a married woman at the time she acquired these lands and has been ever since and still is a married woman. Section 6 of article 13 of the Constitution of West Virginia, which forfeits to the state the land of any person, which has not been charged on the land books with state taxes for any five successive years after the year 1869, contains the following exceptions with reference to married women:

> And any owner of land so forfeited or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years ofter the removal if such disability, have the land, or such interest charged on such books, with all State and other taxes that shall be, and but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: Provided, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited.'

Under this latter clause of section 6 of article 13 of the Constitution the forfeiture of Mrs. Fay's land for non-entry would not be effective until after the end of twenty years from the termination of five years after 1869, that being the date when it was first omitted. The forfeiture, therefore, would not be effective until 1895. So long as the right of redemption remained in Mrs. Fay the forfeiture was not complete. The title of the state had not fully and completely attached and the state had no legal right to proceed to sell said lands through her commissioner of school

lands in 1882, thirteen years before the forfeiture was complete. It is true that this section of the Constitution speaks of the land forfeited and authorizes the married woman, until three years after the removal of her disability, to have the land charged on the books with back taxes and interest and pay the same, and thereby redeem the land. But it is evident that this merely means that the married woman has the right at any time during her disability and within three years thereafter to pay up the taxes upon her lands It is her land and she has the right to pay the taxes. This is so in all such cases. Our statute provides that where lands are sold for delinquent taxes and purchased by the state, the former owner has one year within which to redeem the same by the payment of the taxes and expenditures. It has never been held that during that year the state has a complete title to the land and that the former owner's title is absolutely void. In such case it is never claimed that there has been a break of one year in the plaintiff's title, but it is in effect merely giving the former owner an additional year's time after such sale in which to pay up his taxes. So here a married woman is given the time specified in this section in which to pay up the taxes upon her lands and prevent the complete forfeiture thereof.

Now, in 1882, the state, through her Commissioner of School Lands, instituted a proceeding against this land as if it were waste and unappropriated land instead of forfeited land. The Court knows that lands, which are known as waste and unappropriated, are such as have never been granted by the Commonwealth of Virginia. These lands, as shown by the agreed statement of facts, had been granted by the Commonwealth to Mrs. Fay and Mr. Austin in 1860, and therefore were not waste and unappropriated, but that was the character of the proceeding and Mrs. Fay was not made a party to that proceeding as required by the law in force at that time. (Acts of 1882, chapter 95, section 5.) And under this proceeding these lands were sold and purchased by the parties under whom the defendant claims. This is the foundation of defendant's title and the only title it has to these lands.

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We submit that this proceeding by the Commissioner of School Lands in 1882, was absolutely null and void; first, because Mrs. Fay and the former owners were not made parties as the law required. Second, because the land had never become forfeited to the state and the state therefore had no title to it and no right to sell it for the benefit of the school fund. The Commissioner of School Lands has no right to sell any land except such as belongs to the state, and it has been repeatedly held that any proceeding by him against land, to which the state has not complete title is absolutely void and of no effect as against the title of the real owner of the lands.

*Twiggs* v. *Chevallie,* 4 W. Va. 463.
*McClure* v. *Maitland,* 24 W. Va. 561.
*Auvil* v. *Iaeger,* 24 W. Va. 583.
*McClure* v. *Manperture,* 29 W. Va. 633.
*Wiant* v. *Hays,* 38 W. Va. 681.
*Wakeman* v. *Thompson,* 32 W. Va. Appendix, 1 U. S. Cir. Court.

We have shown that the state got no title by the tax sale of 1869. We have also shown, we think, that under the decision of this Court and the better reasoning there was no forfeiture of said land because it was left off the books by the clerk after the said void sale of 1869. This would be so if the plaintiff had not been under any disability—had been *sui generis.* But being under coverture, there had been no complete forfeiture of the lands in 1882 at the time these proceedings were had, she having until 1895 to pay up the back taxes and prevent the complete forfeiture. The proceeding, therefore, was premature and without warrant of law and void. The land at that time was not completely in the state and was not liable to be sold by the Commissioner of School Lands. This doctrine is well illustrated by the case of *Bennett* v. *Hunter,* 9th Wallace 326. In that case there had been an act of Congress passed June 7th, 1862, levying a war tax on land within the several states. Section 4 of that act provided as follows:

"That the title of, in and to each and every piece or parcel of land upon which the tax has not been paid as above pro-

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> vided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States or in the purchaser at such sale in fee simple free and discharged from all prior lien, encumbrances, right, title and claim whatever."

Chief Justice Chase delivering the opinion of the Court, held, that the first clause of this section 4 did not of itself work an actual transfer of the title to the United States. He says it was in a certain sense forfeited for the non-payment of the taxes. "In other words, it became subject to be vested in the United States or any other purchaser, but not before public sale. *The title remained in the former owner at least until sale, though forfeited in the sense just stated to the United States.*" In the same sense Mrs. Fay's one-half interest in this land was forfeited to the state, but the title remained in her until the right of redemption expired, though forfeited in the sense just stated.

In this proceeding by the Commissioner of School Lands in 1882, the state by the attempted sale to the plaintiff's grantors, collected all the taxes, which had been charged against said lands up to that time. By that purchase she was paid all the taxes due her up to 1884. Since that sale and the deeds made under it the purchasers at said sale and those claiming under them, including the defendants, have paid all the taxes which have been assessed against said lands since said sale. The state therefore cannot proceed against said land for any of the taxes for the years from 1869 to 1905, both inclusive, because she has already gotten all of these taxes. The effect then of this proceeding has been to relieve said lands from all claims of the state on account of said delinquent taxes. The state can therefore never proceed against these lands for any taxes from 1869 to 1905, both inclusive. Under these circumstances to whom does the land belong? Does it still belong to Mrs. Fay or does it belong to the defendants? It clearly does not belong to the state. We insist that it still belongs to Mrs. Fay and that the only claim that the defendant has is a lien or quasi lien upon the lands for the taxes, which it has paid since it has been claiming the same.

As we have seen, there was no complete title in the state at the time she attempted to sell these lands in 1882. We have seen that that sale was void, but that it satisfied the states claim for taxes. The lands were placed on the books in the name of the purchasers and have remained on the books in their names and they have paid all the taxes since that time.

The effect of this, instead of transferring the title to the defendants, has been merely that the payment of the taxes by the defendants accrued to the benefit of Mrs. Fay and has prevented a forfeiture of her title. This is the conclusion which the Supreme Court of Appeals of West Virginia first arrived at in the recent cases of the *State* v. *Snyder* and *State* v. *West Branch Lumber Company;* and it is the only conclusion that can be arrived at and maintained without depriving Mrs. Fay of her property without due process of law and violating the Fourteenth Amendment to the Constitution of the United States. It is true that on a rehearing the Court modified its opinion in the manner as the case is now reported in the case of *State* v. *Snyder,* 64 W. Va. 659, and *State* v. *Lumber Company,* 64 W. Va. 673, the syllabus of which is hereinafter given. But we submit that this land still belongs to Mrs. Fay. It certainly does not belong to the State and the defendants have never acquired it in any way known to the law for the transfer of title to real estate.

The proceedings by the Commissioner of School Lands in 1882, being void because the state had not a complete title to the land at that time, and also because the plaintiff, as former owner, was not made a party, or notified thereof; the purchasers under said proceedings acquired no titles to the land in controversy on this trial by the deeds made in said proceedings, and the defendants acquired no title by the intermediate conveyance from said purchasers or their grantors to them. The defendants have not acquired title by adverse possession as we have shown, the period of limitation as to Mrs. Fay being twenty years. The defendant's possession began in 1887 at the fartherest and this suit was brought in 1901, only fourteen years having elapsed before the suit was brought. Therefore we claim that the title to an undivided one-

half interest in fee simple remained and was in the plaintiff, Eliza T. Fay, in 1901, at the time this suit was brought and still is in her and that she has the right to recover said interest in this action; the defendants probably having the right to a lien upon the land to reimburse them for taxes which they have paid on it.

## NOT DUE PROCESS OF LAW.

But if the Court should take the view that the effect of section 6 of article 13 of the Constitution of West Virginia as interpreted by the Supreme Court of Appeals of this state, is to forfeit the interest of Mrs. Fay in these lands for failure to enter the same upon the land books and pay the taxes thereon, then we respectfully submit that said constitutional provisions, as interpreted by said Court, violates the 14th Amendment of the Constitution of the United States, which provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The interpretation of this article of the Constitution of West Virginia was before the Supreme Court of the United States in the case of *King* vs. *Mullins,* 171 U. S. 404. In that case the Supreme Court did not pass upon the general question whether section 6 of article 13 of the Constitution of West Virginia *alone considered* is consistent with the national Constitution, but left that question to be decided in some case in which it is necessary to do so. The language of Mr. Justice Harlan upon this point is as follows:

> "If the rights of the parties in this case can be fully determined without passing upon the general question whether the clause of the West Virginia Constitution in question *alone considered* is consistent with the national Constitution, that question may be properly left for examination until it arises in some case in which it must be decided."

The Court then entered upon the inquiry as to whether looking at the Constitution and the Statutes of West Virginia together, a remedy was not provided, which if pursued, furnished to the plaintiff and those under whom he asserts titles, all the opportunity that due process of law required in order to vindicate any rights that he or they in respect to the lands in question. And the Court held that in as much as under the Acts of 1891 and 1893 the law required the former owners to be made parties to the proceedings by the Commissioner of School Lands instituted for the sale of forfeited lands and gave to the Court the power to determine all questions of title, possession and boundary, which may arise therein as well as any and all conflicting claims whatever to the real estate in question arising therein; that this statute taken in connection with the Constitution furnished a system, which was not inconsistent with due process of law. And this language is used in the opinion:

> "It thus appears that under the statutes of West Virginia in force after 1882, the owner of the forfeited lands had the right to become a party to a judicial proceeding of which he was entitled to notice, and in which the Court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands."

And they decided that as King had not availed himself of the remedy provided by the statutes of West Virginia for removing the forfeiture from his lands, the Circuit Court properly directed the jury to find a verdict for the defendant. Whilst this opinion of Mr. Justice Harlan has never been a satisfactory one to my mind, and was apparently delivered with a good deal of misgiving by him, yet when we accept it in all of its force, we submit that it is not applicable to this case.

Here is a married woman under disability, which disability is recognized by the Constitution of West Virginia. She has until 1894 or 1895, the right to place her lands upon the books and pay the taxes and relieve them from forfeiture. This right continues three years after her disabilities are removed. But in 1882,

while she is still under this disability, before the forfeiture of her lands is complete, the state institutes a proceeding of which she is given no notice, and in which proceeding her lands are sold; the state collects its taxes from the purchaser and puts itself in position where it can never again institute a proceeding by the Commissioner of School Lands for these same taxes against this land. She had no opportunity to redeem the land in that proceeding because she had no notice of it. She can never have another opportunity to redeem the land because the state can never institute another proceeding, and it is only in such a proceeding that she can exercise the right of redemption. The state has gotten all its taxes, both those that accrued prior to the proceeding of 1882, and those that have accrued since. It is true that the plaintiff, Mrs. Fay, did not pay them, but they have been paid by others, and whether Mrs. Fay gets the benefit of them or not in the sense above argued, still the state is precluded from ever proceeding against those lands on account of these taxes.

This is what has been held in several recent cases by the Supreme Court of Appeals of West Virginia. The holdings are as follows:

> "Land once sold as forfeited for non-entry on the tax books or transferred to junior claimants by the constitution cannot be again sold by the State unless the title so sold or transferred has been itself forfeited; nor in such case can it be redeemed by the former owner."
> *State* v. *King,* 64 W. Va. 549; pt. 17 of the Syllabus.

The recent act of the Legislature of 1905, chapter 42, is cited as sustaining this holding. But Judge Brannon in his opinion shows that such was the law independent of this act of 1905.

> "If the State has no right to sell forfeited land because she has once sold it under decree for some forfeiture, or it has been transferred to a junior claimant by section 3, Art. XIII of the Constitution, the owner of the forfeited title cannot redeem."
> *State* v. *King,* 64 W. Va., 549; pt. 18 of the Syllabus.

> "The transfer to other claimants of land, made by sec. 3 Article XIII of the Constitution, and also a conveyance

under a sale in a suit to sell land as forfeited, constitute grants of the state and create new and original title."
*State* v. *King,* 64 W. Va., 550; pt. 20 of the Syllabus.

In the case of the *State* v. *King,* the defendants claimed under sales by the Commissioner of School Lands. In the case of *State* v. *Snyder,* 64 W. Va., 659, the same doctrine is applied where a sale has been made by the Sheriff for delinquent taxes and a deed made pursuant to such sale. Points 1, 2, 3 and 4 of the Syllabus in that case are as follows:

"1. The state is estopped by section 29 of chapter 31 of the Code from proceeding to sell, as forfeited for non-entry in the name of the former owner, land conveyed by a sheriff to a purchaser, pursuant to sale thereof for non-payment of taxes thereon, though the deed, because of defects in the sale proceeding, is void as to the former owner and fails to vest his title in the grantee therein.

2. By making such deed conclusive evidence, against all persons except the former owner, his heirs and assigns and those who might have redeemed the land within one year after the date of the sale, the statute works, by estoppel, a release, grant or transfer of the title of the former owner to the grantee therein, upon the forfeiture of such title for failure of the former owner to keep the land taxed in his name and the taxes thereon paid for five successive years.

3. Though the statute in question does not mention the state by name, as being one of the persons concluded by such deed, it must be construed as including the state in said class, so as to make it harmonize with the principles and public policy, made manifest by the organic, statutory and judicial system of law of this state, relating to taxation of land and the settlement of land titles, as an incident of the exercise of the power of taxation.

4. The express saving in said section 29, in favor of the state, counties, districts, school districts and municipal corporations, does not confer upon the state power to set aside a tax deed, for the purpose of availing herself of a forfeiture of the former owner's title; but only to proceed, notwithstanding the defective deed, to enforce any lien she may have on the land for prior taxes thereon, treating it, not as her

land, but as the land of the tax-deed grantee, or the former owner, for such purpose and to such extent."

The same doctrine is held in the case of the *State* v. *Lumber Company,* 64 W. Va., 673. The syllabus is as follows:

"1. Though failure of a former owner of land, conveyed by a fatally defective tax deed, made pursuant to a sale by a sheriff for delinquency, to keep the land taxed in his own name and pay the taxes for a period of five successive years, works a forfeiture of the title, the deed is conclusive evidence against the state that the title of the former owner is in the tax deed grantee, and she cannot maintain a suit to sell the land as forfeited.

2. Section 29 of chapter 31 of the Code, by estopping the state from proceeding against the grantee in a fatally defective tax deed, to enforce a forfeiture in the name of the former owner, releases or grants such forfeited title to such grantee in advance of the accrual of the forfeiture."

There is a vigorous dissenting opinion by Judge Brannon in this case of the *State* v. *Lumber Company,* found in 65 S. E. Rep., p. 158. The same doctrine is reiterated in the case of *State* v. *Garnett,* decided November 2nd, 1909, and reported in 66 S. E. Rep., p. 98. The holding is as follows:

"1. When title to land vested in the state by forfeiture for taxes has been transferred to a person by section 3, art. 13, of the Constitution (page LXXXIV, Code 1906), the state cannot sell the land as forfeited for any forfeiture then existing. All title then in the state by reason of purchase or nonentry for taxes passes by such transfer to such person.

2. After title to land vested in the state by forfeiture for taxes has been once transferred to a person by force of section 3, art. 13, of the Constitution (page LXXXIV, Code 1906), the former owner of the forfeited title cannot redeem the land.

3. When sale has been made of land as forfeited for taxes in a proceeding for its sale as such, it cannot be again

sold for any forfeiture existing at the date of such sale under the same or other title.

4. When the state owning land under a sale for taxes afterwards sells it to an individual for non-payment of taxes, subsequently assessed, the state will be estopped from selling the land under its title acquired by such former tax purchase. The title of the state so acquired passes to such individual tax purchaser."

It is clear under these decisions that if the Court shall conclude that it is bound to follow the State Court in the doctrine laid down in the case of *Stockton* v. *Craig* (*supra*), and that this land became forfeited by the failure of Mrs. Fay to keep it on the land books after the tax sale of 1869, and up to the time of the bringing of this suit, then in as much as there was an attempted tax sale in 1869 and a subsequent proceeding by the Commissioner of School Lands in 1882, under which the land was sold to those under whom the defendants claimed, whatever title the State had, passed by that proceeding and although both the tax sale and the Commissioner's proceedings were void, as must be conceded in this case, yet they are valid so far as the State is concerned and she is estopped from again proceeding against this land under Mrs. Fay's title, although it was not forfeited in 1882 at the time the Commissioner's proceedings were instituted. Now, under our West Virginia system, there is no opportunity for the former owner to redeem the land or contest the forfeiture except in a proceeding by the Commissioner of School Lands; that proceeding can never be instituted by the State as to these lands for said forfeiture; and therefore the former owner, Mrs. Fay, can never have an opportunity to redeem these lands or to contest their forfeiture. She never has had that opportunity, she never can have that opportunity, and it is claimed by defendants that her title has been transferred to the present owners not by virtue of the void tax sale or Commissioner's proceedings, but by the operation of the Constitution and without any process of law whatever.

It is argued that Mrs. Fay had the right for twenty years to put these lands upon the books and charge them with back taxes

and pay the same, and thereby redeem the lands and that having failed to do this, the forfeiture became complete at the end of the twenty years. We have attempted to show that under the circumstances of this case when the taxes had been paid by others it was neither necessary nor practical for her to do this. But if we are held to be in error in this, then we say that still there has been and can be no process of law. It is still a forfeiture without any inquest and judicial proceeding. Why is such a forfeiture any better at the end of twenty years than at the end of five years? The objection is not that the party has not complied with some provisions of law, but it is that he has had no opportunity to show that he has so complied, in a judicial proceeding. The case of *King* v. *Mullins* was decided upon the theory that King could have compelled the Commissioner of School Lands to institute proceedings in which he could have appeared and relieved his land of the forfeiture, and that having failed to do so, he could not complain that his land had been taken without due process, he having the power to bring about the institution of the proceeding, which would have amounted to due process of law. But in this case Mrs. Fay has never had such power. The state itself instituted a proceeding in 1882, but gave her no notice of it. The effect of this, however, was to prevent Mrs. Fay from ever bringing about another proceeding in which she could have relieved herself of the forfeiture. An attempt is made in this case as in the Mullins case to frighten the Court with the idea that the decision in favor of the plaintiff would result in disturbing the land titles of the State of West Virginia. This is a mere fiction, a figment of the imagination of the counsel. There are scarcely any lands in the state, in which the title is similar to this. Since 1882 the tax proceedings have been cured by the Act of that year. As to sales made prior to that time, in nearly all instances there have been ten years possession held, which would prevent a reentry by the former owner, and there is also the doctrine of laches which the Courts readily apply. We think that this bugaboo should not divert the attention of the Court from the fundamental legal and equitable principles which underlie this dis-

cussion and that the provision of the Constitution enacted for the protection of just such persons as Mrs. Fay, should be applied in all their force and vigor in this case. The defendants have had possession of this land and gotten out a large quantity of coal and marketed it and been paid for all they have expended on them. There is no claim for mesne profits, and so it will be no injustice to them, but a reasonable measure of justice to the plaintiff, if she can now recover these lands which rightfully belong to her.

There are one or two matters mentioned by Counsel for defendants, which perhaps should be noticed. Speaking of defendants' title, on page 25 of the brief, they say that whatever irregularities existed in the proceeding by the Commissioner of School Lands, have been cured by section 19 of chapter 105 of the Code as reenacted by the Acts of 1905. We do not see that this Act helps them at all. It merely provides that *whatever right, title, interest or estate* the State of West Virginia had in the lands at the date of the sale or conveyance by the Commissioner of School Lands shall be deemed and held to have passed to the grantee; whether the land was proceeded against as forfeited or waste and unappropriated and notwithstanding any irregularity or error in the proceeding, etc. We say that this Act has no effect here because *the State of West Virginia had no title to these lands at that time.* The lands were neither waste and unappropriated nor had the state acquired title by the tax sale of 1869, nor by non-entry on the land books.

Second. This proceeding was not binding upon Mrs. Fay because she was not a party to it. This is not mere irregularity or error. And if those proceedings were void and no title was acquired at the time under them, and if the title still remained in Mrs. Fay, her title could not be divested by this Act of 1869. This is the doctrine announced in the case of *State* v. *Harman,* 57 W. Va. 447, and see opinion by Judge Brannon, pages 454 to 457, inclusive.

## COMMISSIONER'S DEED NOT A GRANT IN THIS CASE.

It is further claimed that the deeds from Commissioner Auvill were grants from the Commonwealth within the meaning of section 3 of article 14 of the Constitution. The case of the *State* v. *Jane Jackson*, 56 W. Va. 571, does hold that a valid deed made by the Commissioner of School Lands is a grant within the meaning of that section. But as we have shown, these deeds were void absolutely. They passed no title to the grantees and surely it cannot be claimed that a void deed from a Commissioner of School Lands in a void proceeding constitutes a grant from the Commonwealth. These deeds did not have the effect to convey the Fay title. In the Jane Jackson case the Court says the deed to Landsburg did have the effect to convey the Jackson-Harrison title, which was then forfeited. This is the difference between the two cases.

## CONCLUSION.

Mrs. Fay in 1860 purchased from the State of Virginia an undivided half interest in 1200 acres of the State's unappropriated lands, and obtained a patent or grant from the State for the same, conveying the same to her unconditionally.

The Sheriff of McDowell County undertook to sell the land in 1869 for delinquent taxes, and at said sale attempted to purchase it for the State. He did not comply with essential requirements of the law, and the sale was void and the State did not acquire any title by such attempted purchase. The title therefore remained in Mrs. Fay.

In 1882 the Commissioner of School Land proceeded against the land, as if it were waste and unappropriated, for the purpose of selling it for the benefit of the school fund. It was not waste nor unappropriated, and as the State then had no title to it under the void tax sale of 1869 or otherwise, it was not liable to be sold for the benefit of the school fund. It was Mrs. Fay's land in 1882 and not the State's land. She was not made a party to and had no notice of the proceedings. This whole proceeding was therefore

void and the sale was void at least against Mrs. Fay, though its validity cannot be disputed by the State. The purchasers got no title as against Mrs. Fay. The land was wild and unoccupied until 1887. Defendants' possession certainly did not begin earlier than 1887. The statute of limitations against a married woman as to her lands, which are not her "sole and separate estate" is twenty years.

This action was brought in 1901, so that at the most there had been only fourteen years adverse possession. And yet the defendants claim the land. How did they get it? They say the State transferred the title to them. How did the State get it? They say by forfeiture for "non-entry" on the tax books. The State never took possession of the land; she never sold it at any valid sale; she never published or served on Mrs. Fay an notice that she was going to sell or dispose of it or forfeit it; Mrs. Fay never had such notice either by publication or personal service; she never has had any hearing nor any opportunity to be heard in the matter; never can have any hearing.

When she found the land in the adverse possession of defendants she brought this action against them within the time allowed by law—before she was barred by limitations.

Has her title been taken from her by "due process of law?" Of what has this "due process" consisted? Has there been *any* process, due or otherwise? Process means doing something—a forward movement—a procedure of some kind. Title to Mrs. Fay's land cannot be taken from her and given to Crozer without *something being done*—some procedure of some kind. The mere writing something in the Constitution in 1872 cannot *ex proprio vigore* without any further action or procedure, take her land from her in 1880 under the State and Federal Constitutions. The making of the Constitution—section 6 of Article 13—is not due process of law. There must be something else.

Now what else has there been in this case to divest the title of Mrs. Fay? Absolutely nothing. It is claimed that by the silent operation of this language written in 1872, Mrs. Fay's title

was taken from her. We are not told exactly when this took place. Was it in 1875—that is, five years after 1869—the year the land was last on the books? Or was it in 1880, ten years after 1869? Or was it in 1890, twenty ears after it was left off; that being the period within which, under the provisions of section 6, Article 13 of the Constitution, she had the right to have the land charged on the books with back taxes with 10% interest thereon and pay the same.

Whether the title was lost in 1875, in 1880 or in 1890, there was no "process of law" at either of those times—nor before nor since. It being always remembered that the tax sale of 1869 and the Commissioner's sale in 1883 were absolutely void, and therefore cannot be invoked to supply the "process of law."

His Honor, Judge Dayton, in the opinion filed in this case, and which is printed in the record, does not discuss this question, but merely says on page 56 of the record:

> "In this case it is insisted that this sec. 6, Art. 13 of the West Virginia Constitution contravenes the 14th Amendment of the Federal constitution. This question has been fully discussed by Brannon, Judge, in *State* v. *Sponangle*, 45 W. Va., 415, where it was held this article was not in violation of the Fourteenth Amendment and this decision has been affirmed by that court consistently ever since by such cases as
>
> *State* v. *Cheney*, 45 W. Va. 478;
> *State* v. *Swann*, 46 W. Va. 128;
> *Webb* v. *Ritter*, 54 S. E. 484;
>
> It has also been passed upon by the Supreme Court in two cases taken there from this court, and the same conclusion reached.
>
> *King* v. *Mullin*, 171, U. S. 404.
> *King* v. *Panther Lumber Co.* 171 U. S. 437.
>
> In view of these decisions I must hold the provision not in conflict with the Fourteenth Amendment."

We have shown that the case of *King* v. *Mullin* was not like this case. The Court there expressly refrained from deciding the question involved here, viz: "whether the clause of the West Virginia Constitution in question *alone considered* is consistent with the national Constitution;" but left it "for examination until it

arises in some case in which it must be decided." Opinion of Mr. Justice Harlan, 171 U. S. page ———.

There the Court held that the Constitution and Statutes together constituted a system which provided due process of law by requiring the former to be made a party to the suit of the State to sell the land for the benefit of the school fund, with right of redemption before sale, &c.

But as we have seen, this Statute and such a proceeding has no application to this case. If there has been any forfeiture of Mrs. Fay's land it has been by the provision of the forfeiture "clause of the West Virginia Constitution" and *it* must be *"alone considered"* in determining the validity of that alleged forfeiture; because under the decisions of Supreme Court of West Virginia in the cases of

*State* v. *King*, 64 W. Va. 549;
*State* v. *Snyder*, 64 W. Va. 659;
*State* v. *Lumber Co.* 64 W. Va. 673 and
*State* v. *Garnett*, 66 S. E. Reporter, 38,

the State cannot again bring suit through her Commissioner of School Lands "unless the title which she sold in the proceedings of 1882 to the defendants or those under whom they claim shall itself become forfeited, nor can Mrs. Fay redeem it.

*State* v. *King*, 64 W. Va. 549, point 17 of syllabus. There is nothing in this case therefore to supplement or aid the section 6 of Article 13 of the West Virginia Constitution. It stands alone as the muniment of the title of the State and her transferees, the defendants in this case. And the question as to whether this section 6 is consistent with the Fourteenth Amendment of the Constitution of the United States must be decided in this case.

It was not decided in *King* v. *Mullin*, and therefore we respectfully submit that that case could not be properly invoked by Judge Dayton to sustain his decision in this case.

## SUMMARY.

1. The plaintiff has a grant from the Commonwealth.

2. She has never voluntarily conveyed away her title.

3. The period of limitation against her is twenty years.

4. Defendants' possession had not continued more than fourteen years when this suit was brought, therefore she is not barred by limitation.

5. The land was not forfeited for non-entry prior to 1865 because it was not assessable for the year 1860.

6. The purchase by the State of West Virginia in 1869 was void. The state got no title by said purchase.

7. The land was not forfeited by the act of the clerk in leaving it off the land books after said void sale of 1869.

8. The proceedings by the Commissioner of School Lands in 1882 were void and passed no title to defendants.

(a) Because the state had not acquired any title to these lands at that time either by the sale of 1869 or by forfeiture afterwards, and therefore had nothing to sell.

(b) Because Mrs. Fay, the former owner, was not made a party as required by the Act of 1882 then in force.

(c) Because the lands were not waste and unappropriated.

9. Mrs. Fay, being a married woman, had twenty years after 1895 in which to pay up the taxes on her land and prevent a complete forfeiture. Before this period elapsed, the state collected its taxes by the sale to defendant's grantors in 1884, and has collected all the taxes on this land since that time from the defendant and those under whom it claims, thus rendering it unnecessary and impossible for Mrs. Fay to pay these taxes, and also rendering it impossible for the State now to claim that the lands are forfeited. The state got her taxes before the forfeiture was complete and the land is therefore Mrs. Fay's and not the defendant's.

10. The payment of the taxes by the defendants and those under whom they claim upon this Fay title, the defendants' title being invalid, accrues to the benefit of Mrs. Fay, and prevents the forfeiture of her title.

11. To enforce a forfeiture of these lands under the facts of this case would be to deprive Mrs. Fay of her land without due process of law, and thus violate the Constitution of the United States.

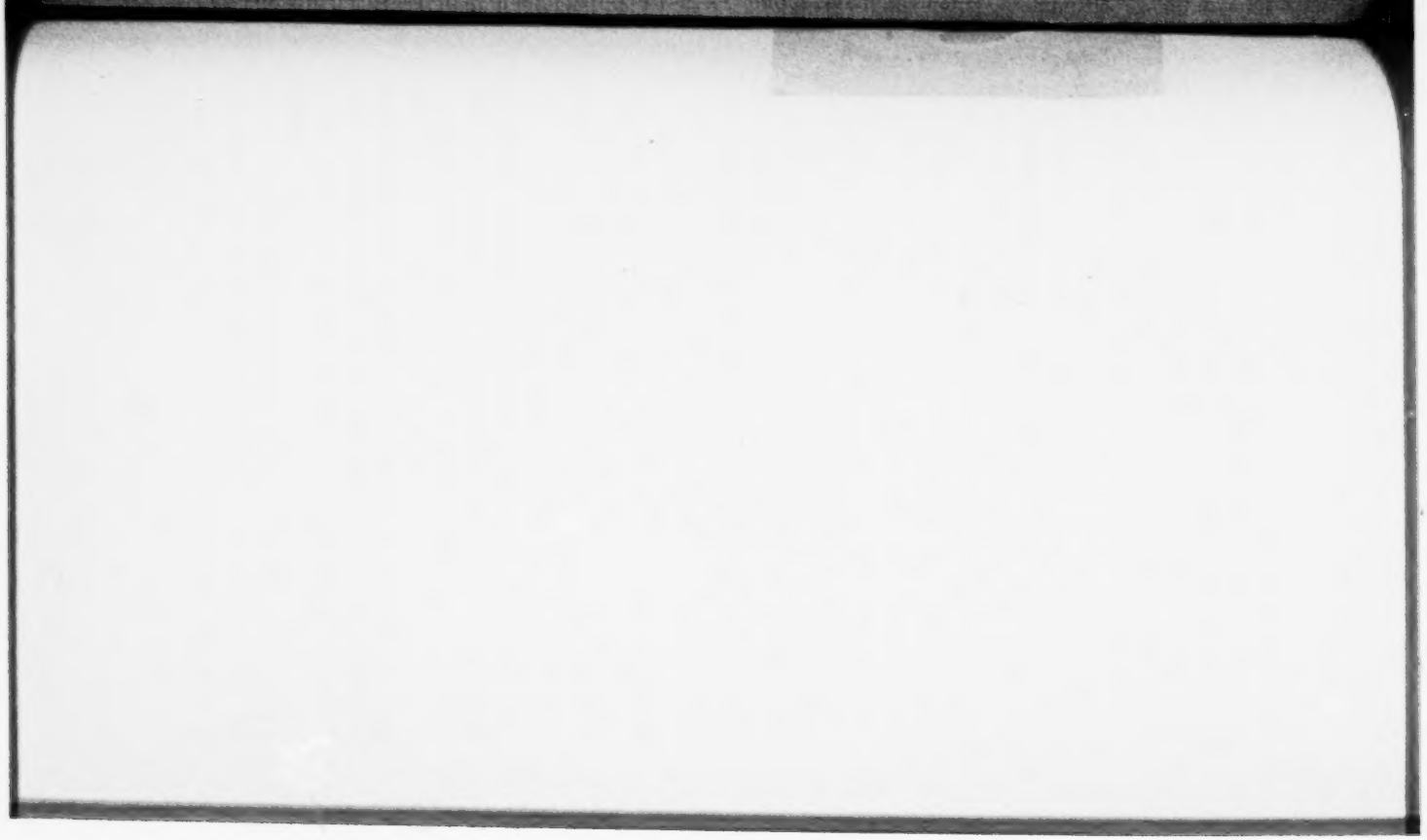
(a) There has been no process of law whatever so far in this matter. No forfeiture has ever been adjudicated by any competent tribunal, and she has had no opportunity to be heard on that question.

(b) There can be no process of law hereafter because the state has got her taxes and it cannot again proceed against her land through the Commissioner of School Lands, and there is no other way provided in the law for a former owner to redeem his lands except in a proceeding by the Commissioner of School Lands.

(c) The state by the proceeding in 1882 cut off Mrs. Fay's right and power to redeem these lands and gave her no opportunity in that proceeding to redeem ithem.

12. The title not being vested in the state, and the defendants' title being void, the plaintiff has the right to recover upon her original title.

GEORGE E. PRICE,
*Attorney for Plaintiffs in Eror.*



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IN THE

# SUPREME COURT OF THE UNITED STATES

## No. 165.

ELIZA T. FAY AND WILLIAM FAY, HER HUSBAND,
Plaintiffs in Error,

versus.

SAMUEL A. CROZIER, ET AL., TRUSTEES, Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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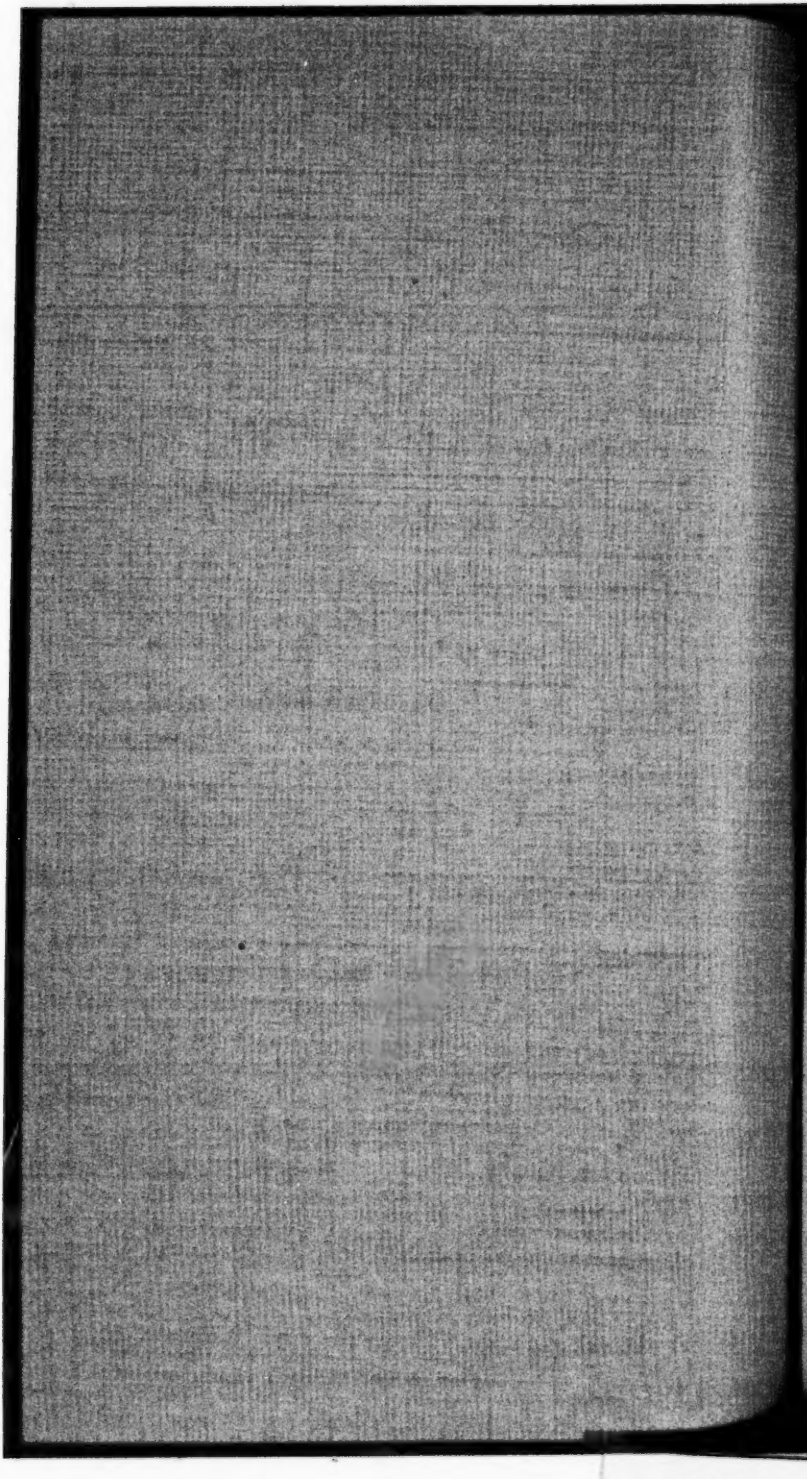

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# SUPREME COURT OF THE UNITED STATES

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*Plaintiffs in Error.*
*vs.*
SAMUEL A. CROZIER ET AL, TRUSTEES, *Defendants in Error.*

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

We ask leave to reply briefly to some of the points made in the brief of counsel for defendants in error.

### NO FORFEITURE PRIOR TO 1865.

In our former brief we showed that the patent to Fay and Austin was dated January 3, 1860; that under the Statutes in force at that time, it was not assessable for 1860. Only such lands were to be returned for assessment in any year, as had been granted during the preceding year ending December 31st., the effect of which was to exempt from taxation, lands granted during the year in which the assessment was made.

In the brief of defendant's counsel they insist that the obligation to pay taxes for the year 1860, is to be found in the Act of 1869, and not the acts which were in force in 1860. We submit that this is untenable, because, if there were no obligation to enter the lands for taxation in the year 1860, under any statutes then in force, the Legislature could not, in 1869, forfeit the land

for failure to pay taxes for the year 1860; and in fact the Statute of 1869, does not profess to do anything of the kind. The Statute as quoted on page 9 of defendant's brief, is as follows:

> "It shall be the duty of any persons owning any real estate to cause the same to be entered on the Land Books of the proper assessor and charged with the State taxes therein not charged to the owner for the year 1832, or any year thereafter heretofore or hereafter not released, paid, or in any manner discharged, which *were and shall remain properly chargeable thereon.*"

It is clear therefore that this duty of the owner was simply to cause the land in 1869, to be charged with all previous taxes, which were *properly chargeable* against the land and had not been paid or released. No taxes for 1860 were properly chargeable against the land as we have shown, and this was so held by the Circuit Court.

## THE TAX SALES OF 1869 WERE VOID—NOT MERELY VOIDABLE.

On pages 18 to 23 of defendant's brief it is argued that the tax sales were merely voidable and not void. This is contrary to all the holdings, both of the State and Federal Courts in West Virginia. Such defective tax sales and deeds have been uniformly held and acted upon as absolutely void and not merely voidable.

We are surprised to find counsel, on page 23, using this language:

> "We desire especially to call the Court's attention to the fact that each and every one of the cases cited and relied on to defeat the sale of 1869, were cases of direct proceedings and not one of collateral attack."

If the Court will examine the case of *Barton's Heirs* v. *Gilchrist*, 19 W. Va. 223, which is the first case cited in our former brief on this question, it will find that it was an action of ejectment and that defendants, just as in this case, set up a tax deed, and that exactly the same defects, with others, as applied to these

sales of 1869 in this case, applied in that case; namely, that the report of the sale was not returned within the time required by law, to the Clerk's Office. There was an agreed statement of facts just as there is here. The Court held the tax deed *null and void and furnishing no defence,* and this was affirmed by the Supreme Court of Appeals of West Virginia. This case clearly holds that the tax sale and deed was absolutely void and could be attacked *collaterally,* and this is the uniform holding of our Courts.

We are also surprised to find counsel professing to quote on pages 20 and 21 certain language alleged to be in the opinion of Judge Dent, in the case of *Stockton* v. *Craig,* 56 W. Va. 454. We ask the Court to compare this language professed to be quoted by defendant's counsel, with the opinion of Judge Dent as published in 56 W. Va. page 465 to 477 inclusive; and we do not believe the Court will find, in that opinion, any of the language set forth in defendant's brief. This may be accounted for by the statement on page 18 of their brief, that Judge Dent has a written opinion which was not used in the published opinion in the case. If we are to travel outside of the record, we believe that it is true that Judge Dent wrote an opinion on this case, and it was so unsound, that, upon a petition for re-hearing he abandoned it absolutely and wrote another opinion, taking different grounds and giving different reasons for his conclusion; and we presume that it was this discarded opinion that counsel are quoting from. Surely it can have no weight with this Court.

## NO ANALOGY TO THE STATUTE OF LIMITATIONS.

Counsel argue that the forfeiture of lands under the Constitution of West Virginia for non-entry on the land books is analogous to the rights required by an adverse occupant under the Statute of Limitations.

We respectfully submit that there is no similarity or proper analogy between the two. The West Virginia Statute of Limitations for the recovery of lands is as follows:

faults on their part. The language of the Statutes may be ever so peremptory that such and such defaults shall work a forfeiture of the charter, but it is uniformly held that until some proceeding is taken to adjudge the forfeiture, the corporation still retains its charter; and if it should bring a suit to collect a debt or for any other matter against a third person, such person cannot plead that its charter has been forfeited and that it is no longer a corporation. In other words, *the forfeiture cannot be set up and enforced collaterally.* We say the same principles apply here,—that due process of law is required before a man's property can be taken. There must be *some proceeding which constitutes a part of the taking,* and it is not to be considered as taken until there has been some such proceeding. It is not a proceeding to ascertain whether at some time in the past certain things were done or omitted, which would cause a forfeiture; but the proceeding is a necessary part of the means by which the forfeiture takes place and becomes effective. That, therefore, this action of ejectment now brought by Mrs. Fay cannot be treated by this Court as the process of law by which her land is taken from her and given to the State or the defendants. It will be remembered that the provision of the Constitution is that the property *shall not be taken without due process of law.* That means that it *shall not be taken except by the means of due process of law.* Due process of law is a part of the means by which the owner is deprived of his property. In other words, the Government cannot arbitrarily take a man's property *without giving him a chance to be heard at the time it is taken.* It will not do to say, when he brings a suit against a third person for his property, that it was taken from him years ago without any opportunity for him to be heard. Such a doctrine would absolutely destroy the whole effect of the constitutional provision. It would be in the power of the Government to provide all sorts of causes for the arbitrary forfeiture of title of citizens to their property. If the causes provided for took place the property would be transferred without any hearing or process of law whatever, and years afterward, when the question arises between other individuals, these facts may be set up

and forfeiture pleaded, and the party has lost his property without ever having an opportunity to defend himself. It is easily seen to what serious consequences this new doctrine as to due process of law would lead, and it is unnecessary to elaborate upon it.

The learned Judge who delivered the opinion in the case of *Gaines* v. *Buford,* 1 Dana, 481, states this matter very forcibly in the following language on page 511:

> "It is not a satisfactory answer to these suggestions that the question of forfeiture is adjudicated upon by a court of justice, and that Gaines has had a public trial, before a jury, *in this action of ejectment.* He was there defending no plaint of the commonwealth; there was no accusation against him at the instance of the commonwealth, of which he was notified, and called upon to defend; nor was the jury sworn to try an issue between them. It was no prosecution, 'carried on in the name and by the authority of the Commonwealth of Kentucky.' The question of forfeiture and divesture of the title came up collaterally only. It was used as a part of the defendant's case, to show that the plaintiff's title had, therefore, before the institution of the suit, passed from him and vested in the commonwealth. The forfeiture was the result of nothing done in that suit. The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture theretofore incurred, and of a divesture of title which had therefore taken place. The Court and jury were not a means for carrying into effect what the legislature had commanded, but acted upon what it was supposed the legislature of itself had already done. The title passed from Gaines on the 2nd. of August, 1825, long before this trial, or it is still in him."

Upon the general question as to the necessity for some proceedings to complete a forfeiture we respectfully refer the Court to case of *Marshall* v. *McDaniel,* 12 Bush 378 (Ky.) in which the Court, after discussing the matter, uses the following language:

> "We conclude without hesitation that so much of the

act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the commonwealth, is unconstitutional and void.

To deny to the legislature the power to work forfeitures for the non-listing of property for taxation, by the mere inherent force of the legislative enactment, is not to question its rights to provide that without judicial proceedings it may cause property to be assessed, takes to be levied, tax precepts to be issued, and the tax payers property to be seized and sold for the purpose of enforcing collections. * *

But when the commonwealth, instead of thus subjecting to sale the delinquent tax-payer's property, or so much as may be necessary to raise his proportion of the public burden, undertakes to treat his delinquency as a crime, and to punish him by forfeiting his estate, the constitutional guarantee which secures to a citizen the right to be heard before his freehold, shall be seized, or he be condemned and to be proceeded against in accordance with 'the law of the land,' applies and the courts cannot, in deference to the legislative department of the government, hesitate to vindicate the constitutional rights of the individual."

The same doctrine is laid down in:

*Packard* v. *Beaver Valley Land & Mining Company*, 96 Ky. 249.

*State* v. *Heman*, 70 Mo. 441.

*Scharf*, Commissioner of the Land Office v. *Tasker*, 73 Md. 380.

*Eastern Land, Lumber & Manufacturing Company* v. *State Board of Education*, 101 N. C. 35.

Respectfully submitted,

GEO. E. PRICE,

*Attorney for Plaintiff in Error.*

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Clerk.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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## No. 165.

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ELIZA T. FAY AND WILLIAM FAY, HER HUSBAND,
PLAINTIFFS IN ERROR,

*vs.*

SAMUEL A. CROZER ET ALS., TRUSTEES, DEFENDANTS IN ERROR.

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## SUPPLEMENTAL NOTES OF ARGUMENT FOR PLAINTIFFS IN ERROR.

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GEORGE E. PRICE,
*Attorney for Plaintiffs in Error.*

(21,185.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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# No. 165.

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WILLIAM FAY AND ELIZA T. FAY

*vs.*

SAMUEL A. CROZER ET ALS., TRUSTEES.

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## SUPPLEMENTAL NOTES OF ARGUMENT FOR PLAINTIFFS IN ERROR.

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There were several matters of defense set up by defendants.

The court decided in favor of the plaintiffs on all these matters of defense except that of forfeiture of plaintiffs' title under the Constitution of West Virginia.

The court below held the title was forfeited to the State and overruled our contention that such forfeiture was without due process of law.

This decision was based on the case of King *vs.* Mullins.

That case decided that King had not been deprived of his land *involved in that case* without due process

of law because the State had provided a means through the court of school land proceedings by which he could have had at any time due process of law, but he had not availed himself of it.

All that was decided was King could not be heard to complain that the State had taken his land without due process of law.

This decision was expressly and avowedly based on the fact that the State had provided this due process by her statute and he could not say he was deprived of it.

Now in this case the State has, by the acts of her officers in proceeding to sell this land before it had become irredeemable, placed it beyond her power to allow Mrs. Fay the "due process of law" guaranteed by the Constitution.

The land was left off the books in 1869. The five years of non-entry expired in 1875. Mrs. Fay had 20 years after that, or until 1895, to place the land on the books and pay up the back taxes. She did not avail herself of this.

Then the land became *irredeemable*, and then for the first time the State had the right to proceed to sell the land for the benefit of the school fund.

In that proceeding Mrs. Fay would have been a necessary party, and if summoned no doubt would have redeemed the land.

But this was not done because the State had way back in 1882 already proceeded against and sold this land as "waste and unappropriated" land in a proceeding in which Mrs. Fay was not a party.

And she could not again proceed to sell the land.

If the State had proceeded regularly in accordance with the Constitution and statutes there would have been due process of law.

But by proceeding prematurely and not making Mrs. Fay a party, and by the decision of the West Virginia Court of Appeals that this prevented her from proceeding again in a regular manner, the State had deprived Mrs. Fay of the process of law given under the Constitution and statutes of the State, and has deprived her of her land.

This case is not similar to the King case.

This land was transferred to Crozer before the State got a complete title to it; yet the State is bound by it.

The King land was not. It was transferred after the State's title was complete.

The thing that placed the defendants in position to take the transfer from the State, which they claim, was the illegal premature proceeding by the State in 1882 under which they got a deed constituting "claim and color of title" and under which they paid the taxes which they claim entitles them to the land.

But for the illegal and void act of the State in 1882 the defendants would not in 1895 or thereafterwards have had any color or claim of title and would not have paid the taxes, and therefore would not have been in position to claim a transfer of the title to them under article —, section —, of the Constitution.

In this view of the case, therefore, is it not clear that *the State has deprived Mrs. Fay of her property without due process of law?*

GEO. E. PRICE,
*Attorney for Plaintiffs in Error.*

JUDD & DETWEILER, INC.,
PRINTERS,
WASHINGTON, D. C.

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No. 165

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vs.

SAMUEL A. CROZER ET AL., TRUSTEES,
TURKEY GAP COAL AND COKE COMPANY, AND
HOUSTON COAL AND COKE COMPANY,

*Defendants in Error.*

## BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

No. 165

IN THE

# Supreme Court of the United States

ELIZA T. FAY AND WILLIAM FAY, Her Husband,
*Plaintiffs in Error,*

vs.

SAMUEL A. CROZER ET AL., TRUSTEES,
TURKEY GAP COAL AND COKE COMPANY, AND
HOUSTON COAL AND COKE COMPANY,
*Defendants in Error.*

## BRIEF OF COUNSEL FOR DEFENDANTS IN ERROR.

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT:—

This is an ejectment for recovery of an undivided half interest in 1200 acres of land in McDowell County, West Virginia, against the above defendants and others, submitted to the Court in lieu of a jury, for decision upon an agreed statement of facts; the submission being limited in terms to the above parties, and to that portion of the 1200 acres embraced within the bounds of three deeds from the commissioner of school lands of McDowell County to those under whom the above defendants claim, (so far as the same interlocks with said 1200 acres). These deeds, for brevity, are hereinafter referred to as the "school land deeds."

The "facts agreed," condensed, are as follows:

*First:* That Eliza T. Fay, the female plaintiff, then a married woman and still under coverture, together with one S. W. Austin, on January 3, 1860, procured from the Commonwealth of Virginia a patent for the above 1200 acres; (a part of a tract of 40,000 acres theretofore forfeited in the name of one Pickett); that said 1200 acre tract was *not entered* on the land books *until 1865;* was continued thereon for the years 1866, 1867, 1868 and 1869; was in 1869 *sold* by the sheriff of McDowell County for the non-payment of the taxes of 1865, 1866, 1867 and 1868, and purchased for the State, and has *never since been redeemed;* that, *after* the year 1869, it disappeared from the land books and was never again entered for any year thereafter in the name of any of the patentees, or of any one claiming under, by or through them, or either of them.

*Second:* That in 1882, the commissioner of school lands of McDowell County reported to a proper Court a tract of 5000 acres (including the lands in controversy) as "waste and unappropriated lands," liable as such to sale for the benefit of the irreducible school fund; and under decrees in that proceeding, divided same into lots and sold them at public sale, *three* of the lots so sold being purchased by those under whom the defendants claim; and, at the direction of the Court, executed the school land deeds referred to, one for 46 acres, one for 113 acres, and one for 1281 acres, each in part interlocking with the 1200 acres, an undivided one-half of which is here sued for by the plaintiffs.

*Third:* That said several parcels passed by regular conveyances from the respective grantees to *Samuel A. Crozer,* who, in 1887, executed coal leases thereon, to the defendants, *Turkey Gap Coal and Coke Company* and *Houston Coal and Coke Company,* who at once took possession of their respective leaseholds and have since held them in actual possession, min-

ing coal and doing all things other, incident to large coal operations, investing large sums of money in extensive plants now in active operation for more than twenty-three years.

*Fourth:* That, subject to said leases, Crozer's title passed by apt and proper conveyances to Crozer and others, trustees, defendants, and is still in them.

*Fifth:* That, upon the execution of these school land deeds the parcels conveyed by them respectively were at once caused by the grantee to be entered upon the land books of McDowell County and charged to them with taxes, and that they, and those so claiming under them, have for each and every year since, caused said parcels to be so entered and charged with taxes, and have paid all taxes so charged.

*Sixth:* That neither of the plaintiffs, nor their co-patentee, nor any one claiming under them or either of them, or for them, have from the *date of the patent* (now fifty years old) down to the present time, paid any taxes, and that neither of the plaintiffs, nor Austin, nor any one under them, have, *at any time,* had any *possession* of said lands or any part of them.

*Seventh:* That this action was instituted in 1901 and service was accepted by defendants on March 15, 1901.

## THE PICKETT SURVEY.

In substance it appears from the exhibits that all these lands were embraced within an earlier grant of 40,000 acres to one Pickett, which, because of failure to be entered for taxation, became forfeited prior to 1860, *wherefore,* that title became *re-vested* in the Commonwealth, and thus subject to re-entry and grant, whereby the issuance of the patent to Eliza T. Fay and to said Austin became permissible. It is admitted that these lands were then "wild" and of little value, part of the wilderness of McDowell County, and continued so until taken into possession, improved and developed by the *defendants* in 1887, as above set out.

The plaintiffs rely on the forfeiture the "Pickett grant" and on their "junior patent" of Jan. 3,1860; unsupported either by possession, entry for taxation or payment of taxes.

## THE PLAINTIFFS' CASE.

The defendants rely on the *forfeiture* of the *plaintiffs'* title, through delinquent tax sales to the State, and non-entry for taxation; and on title in themselves, (or color of title), under the above school land proceedings and deeds, supported by *long possession* and *continuous* and *regular assessment and payment of taxes;* but, for the purposes of this suit, the question is narrowed to a simpler issue, under the indisputable proposition of law, that a plaintiff, to recover at all in ejectment, must recover upon the *strength of his own title,* not the weakness of that of his adversary. Wherefore, if the title of the plaintiffs ever became forfeited, being by the "case agreed" *still unredeemed and therefore outstanding* it is immaterial on this hearing, whether so outstanding in the *State,* or in the *defendants*; in either event, the judgment must be for the defendants. It is admitted by the plaintiffs, as they had to admit, that if a forfeiture did at any time occur, from the date of their patent to this date, then the Fay-Austin title as to them *is still outstanding;* no redemption having ever been made, or even attempted. The vital and only question then is:

WAS THE PLAINTIFFS' TITLE EVER FORFEITED?

On the "case agreed," these lands, under the plaintiffs' patent, were *omitted* for every year from the patent date, January 3, 1860, to this date (fifty years), except 1865, 1866, 1867, 1868 and 1869; and for these years, the taxes were *not paid,* wherefore, a delinquency, a sale, and a purchase by the State; and no redemption.

It was further, of necessity, conceded; that by the constitution and statutes of the State, omission of lands for five consecutive years worked a forfeiture; and, that in this case, upon the face of the record, one existed.

The defendants have thus shown, *prima facie,* a forfeiture of the plaintiffs' title, as follows:

(1). For omission of the land from the land books, for the years 1860, 1861, 1862, 1863 and 1864.

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(2). Through the sales to the State in 1869 for the taxes of 1865 and 1866 and 1867 and 1868.

(3). The total omission of the lands for 1870 and every year since:

In rebuttal of the foregoing the plaintiffs contend:

As to the *first proposition:*

That the *year 1860* should be excluded, hence leaving but *four* years' omission prior to 1865.

As to the *second proposition:*

That because of certain alleged irregularities in the tax sales of 1869, these sales were void, and failed to divest the plaintiffs' title or to vest any in the State.

As to the *third proposition:*

That, because of a *statute* prohibiting the entry of lands bought by the State, the plaintiffs were *excused* from the subsequent omission, for 1870 and thereafter.

They further contend; that the clause of the constitution of the State of West Virginia allowing *married women* to redeem in "twenty years" afforded them an avenue for escape.

It is also claimed, that the payment of taxes by the defendants, under their purchase from the State, inured to the benefit of the plaintiffs to save a forfeiture.

And *finally,* as *dernier ressort,* fell back on the threadbare contention that the constitution and statutes of West Virginia, providing for a forfeiture for non-entry, were in violation of the Fourteenth Amendment of the Constitution of the United States; this, notwithstanding the repeated holdings of this Court to the contrary.

See *King vs. Mullens,* 171 U. S., 404;
*King vs. Panther L. Co.,* 171 U. S., 437;
*Swann vs. State,* 188 U. S., 739-23, Sup. Ct. Rep., 848;
*King vs. State,* U. S. (decided Jan., 1910).

The numerous assignments of error, are but the above in varied form.

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The trial Judge, in an elaborate opinion, found in the record, held with the plaintiffs on the first and second propositions, and *against* them on the rest; that, while the year 1860 was to be excluded, thus reducing the omission prior to 1865, to *four* years, and while the sales of 1869 to the State were *void*, because of supposed fatal defects in the proceedings, that nevertheless, the *subsequent* omission of the lands for 1869 and *ever since* had worked a forfeiture "for non-entry," and that the statute, forbidding the entry of lands "bought by the State," had no application where the attempted sale was abortive; and by the plaintiffs' own contention, *void*, and ineffectual to pass any right or title to the State.

## THE STATUS OF THE CASE IN THIS COURT.

Under the Federal Judiciary Act, 1891, the plaintiffs had election to go by writ of error to the Circuit Court of Appeals for review upon all the questions involved, or:

To the Supreme Court, on the *single* question of the constitutionality of the constitution and statutes of West Virginia relating to the forfeiture of lands for non-entry for taxation.

Having elected the latter course, the issue here is narrowed to that single issue, one long since, in four successive cases — those cited above — settled beyond per-adventure, wherefore, under the rule applicable to frivolous appeals, this cause should for that cause, be dismissed; and the defendants in error do here, and now *move the dismission of the writ of error allowed herein; and that the judgment complained of, be affirmed.*

> "Questions which can be raised under any of the sub-divisions of section 5 of the Judiciary Act of 1891, (26 Stat. at L. 828, Chap. 17), for the purpose of a direct appeal to the Supreme Court of the United States from a Circuit Court must be *real* and present *controversies that are substantial*, not only from the nature of the principles invoked, but from the relation to them of the party by whom they are invoked."
>
> *Lampasas vs. Bell*, 180 U. S., 274-276.

In support of this motion, we desire to call to the Court's attention the words of Justice Holmes upon the identical question in the case last cited, *King vs. State*, decided by this Court, January, 1910:

> "The defendants in error move to dismiss, and we are of opinion that the motion should be granted. The only serious question in the case, if we assume that King saved it, is *whether the West Virginia constitution and statute are consistent with the Fourteenth Amendment*. But that question was answered in *King vs. Mullins*, 171 U. S., 404, * * * * The whole discussion on this point is little more than an attempt in respectful form to re-argue by unreal distinctions what was decided in the former case. The *question is not open*, and we shall discuss it no more."

## THE MERITS.

But inasmuch as the plaintiffs have, in their brief, discussed all the questions suggested, we beg leave, without waiving said motion, or prejudice to our position, that no other question is proper for consideration here, to answer them.

### 1.

### THE FORFEITURE PRIOR TO 1865.

By the act of 1869, all lands theretofore omitted from the land books for five successive years were forfeited, provided they were not, within a year after the passage of the act, entered, and the taxes paid. The Fay land is admitted to have been omitted from 1860 to 1864, inclusive. It is respectfully submitted that this of itself constituted a forfeiture; and that the learned Judge who presided at the trial fell into error in excluding the year *1860* from the five requisite, under notion that the lands were not taxable for that year.

The patent issued January 3, 1860; under the statute then in force, lands were assessable as of *February* 1st, of each year; see 61, Ch. 35, Code of 1860:

> "Such commissioner shall begin annually on the *first day of February* and proceed without delay to *ascertain all the persons and property on that day, in his district,* subject to taxes and county levies, and otherwise to discharge the duties prescribed by this act."

To escape the manifest liability of these lands for the taxes of 1860, plaintiffs cited other provisions of the chapter, prescribing duties of *other officers* than the assessor; that is to say, section 6, requiring the clerk to make out at the beginning of each year a list of deeds recorded the year preceding; section 10, requiring the *register* to make out a similar list of grants; and section 19, requiring the assessor to value all lands thus reported.

These sections were in *aid* of, and not in substitution for, section 61, requiring *all* persons and property to be assessed as of February 1st of each year. And while this act provided no penalty for non-entry, except that, in case of omission, it should be entered on the books of the following year, and charged with back taxes and interest (19 and 20); nevertheless, such omission was in violation of the law and a default on the part of the land owner.

The lower Court, however, apparently misled by ingenuous argument, held otherwise, assuming that the forfeiture contended for was one in some way based on some provision of the law then, in 1860, in force; such was not the defendants' contention, but instead that the default working the forfeiture was the failure and refusal of the plaintiffs to regard and obey the statute *passed* in *1869*, requiring certain things to be *thereafter* done within a given time, to-wit, all lands theretofore omitted to be *"entered"* within a year next after the passage of that act, and providing the penalty of forfeiture for failure *so to do.*

To make our position plain, brief reference to the history of the statute is necessary.

On the formation of West Virginia, in 1863, in her first constitution submitted to Congress and approved as condition of her admission as a State, she laid the foundation for clearing her land titles from the clouds accumulated under the mal-administration of the old State, and for getting her lands in condition to produce revenue. Immense areas were and for years had been omitted from the land books, thus eluding taxation. It was provided, after exoneration of smaller tracts than 1000 acres, that all prior forfeitures should be made absolute and be enforced unless redeemed from within five years, a period of "*grace*" then given.

And:

At the expiration of the five years (1869); by statute, to the better secure relief from the prevalent evil, it was enacted:

> "It shall be the *duty* of any persons owning any real estate to cause the same to be entered on the land books of the proper assessor and charged with the State taxes therein not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, not released, paid or in any manner discharged, which were and shall remain property chargeable thereon. When any person owning real estate has not or shall not have for five successive years, been charged on such books with such taxes on such real estate, the same and all the title, right and interest of the owner, legal and equitable, thereto *shall* without any proceeding, *be absolutely forfeited and vested in this State. Provided*, however, that such owner *may, within one year* after the passing of this act, cause such real estate to be charged with such taxes chargeable for any such years heretofore and *thereby* prevent a forfeiture for failure to so charge the taxes for such years." Sec. 7, Ch. 125, Acts 1869.

Whatever may have been the duty of the land owner under the act of 1860, here at least was an express duty imposed, that if for any cause, whether through laxity of the laws, of

the officers or the owners, the lands had failed to bear their part of the *State* tax, the owner should cause himself to be assessed with such omitted taxes and pay the same; he was given *a year* within which to discharge the duty; and the same act prescribed the penalty for neglect. To maintain his ownership, he was required to *assert* his claim and discharge his duty in the prescribed time, under penalty of loss of the right. The "one year" was a legitimate "statute of limitation" no more drastic nor open to attack than any other statute of limitation; as for instance, that fixing a time limit to the recovery of land and upon the expiration of the period by operation of law, and without judicial proceeding, transferring the title of the delinquent to the diligent claimant.

Our insistence is, that it was not the statute of 1860 that fixed the obligation or prescribed penalty for the breach, but instead, the act of 1869; by it and by it alone, the duty was prescribed and the penalty imposed, and by it alone must the status of the title be determined.

The lands here, were omitted for 1860 to 1864 inclusive; the patent issued January 3, 1860, and no entry made until 1865; the case falls distinctly within the act of 1869; there was no entry for any of the five years mentioned, *nor within the one year* next after the passage of the act, nor ever, since; one within the letter and spirit of the law which denies to such a title right of assertion in a Court, against the bona fide tax paying occupant.

No one lifts his hands aghast when the statute of limitations transfers, without "office found" a perfect title that has always borne its taxes, to the claimant in possession under mere "color of title," but all, instead, laud the statute, as one of beneficent purpose, to be liberally construed; as one of peace, and "repose." The act of 1869 was distinctly of that class, both in purpose and in operation, and none the less worthy or meritorious; should the Courts be less eager to avail of it, to secure to the diligent the promised recompense for good faith and good citizenship?

What better illustration of the need of this law, and the wisdom and justice of it than the case at bar? A patent obtained in 1860 for 1200 acres at two cents per acre, then abandoned by the patentees; they never set foot upon the land, refused to pay the taxes or even enter it for taxation, and to this day, fifty years and two months, have never paid one cent towards the support of the government, nor even now ask to redeem, or tender payment; but at this late day, after waiting until the defendants purchased from the State under full belief that the title had re-vested, had developed the land, expended hundreds of thousands of dollars in permanent improvements, been in actual possession for twenty-three years paying all taxes and assessments, wants to step in and appropriate it all, including the defendants' moneys and labor. If statutes of "peace" and "repose" are ever favored by the Courts, we can conceive of none more deserving than the one here assailed.

As shown:

Under the laws of 1860, the assessments were made as of the *first day of February*, Mrs. Fay was then owner. The land now claimed by her having been granted by letters patent of January 3rd of that year, under the act of 1869, it became her duty as such owner to cause it to be entered within one year from April 1, 1869, and to be charged with the taxes of 1860, 1861, 1862, 1863 and 1864. This she failed to do; and, by reason of that failure, all her title became vested absolutely in the State.

The *object* of the Act was, to have *all lands charged with taxes*. It therefore required every owner of land omitted for the year 1832, or *any year thereafter*, to cause himself to be charged on the books with such for the omitted years. Failure to do this, within the time given where the omission had been for five years or more, worked the forfeiture. The *effect* of the Act, therefore, was to place a penalty on failure to do something *in the future*, not in the past, so there can be no question as to its constitutionality. This act contained no saving in

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favor of persons under disability, wherefore, the title owned by Mrs. Fay became absolutely vested in the State; and not being redeemed, she is now barred from maintaining this suit.

The plaintiffs' claim that the land was not to be entered until 1861, in reliance on sections 6, 10 and 19, is untenable; these as already shown are but in aid of the assessor, and in no sense in substitution for or in conflict with section 61, Ch. 35, Code 1860.

> "Each commissioner shall begin annually, on the *1st day of February*, and proceed, without delay, to ascertain *all the persons* and *property*, on *that day*, in his district subject to taxes and county levies; and otherwise to discharge the duties prescribed by this act."

Nor with the general tenor of that chapter, to have *all property* including lands, assessed for taxation to the respective owners, *as of February 1, 1860;* and, requiring all persons to give to the assessing officer information upon which to make the assessments as of that date.

The Act of 1869 is valid; and was intended to, and did, execute itself, and forfeited land by its own force alone; and the Circuit Court should have so held.

Discussing a similar statute, the Court of Appeals of Virginia, in *Wild vs. Serpell,* 10 Gratt., 405-408, said:

> "In order to consummate and perfect a forfeiture in such a case, no judgment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves, of their own force and by their own energy, work out for their own purpose and operate effectually to divest the title out of the defaulting owner, *and perfectly to vest it in the Commonwealth without the machinery of any proceeding of record,* or anything in the nature of an inquest of office. Upon these subjects I have nothing therefore, to say upon this occasion, except that considering the peculiar condition of things in that part of the State lying west of the Alleghany Mountains —

a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient *as the constitutional power of the Legislature to enact them was clear and unquestionable.*"

See also:
*Staats vs. Board,* 10 Gratt., 400.
*Levasser vs. Washburn,* 11 Gratt., 572.

"Acts 1869, Chapter 125, and section 6, Article XIII of this State Constitution, forfeiting land for non-entry for taxation, are not repugnant to amendment 14 of the Constitution of the United States."

*State vs. Cheney,* 45 W. Va., 478.

## TAX SALES OF 1869.

The plaintiffs claim that these sales were *void* and failed to pass title to the purchaser, the State.

The alleged defects are:

(1). That the recorder failed to *note the date* on which the sales lists were returned and recorded.

(2). That the sheriff's affidavit to the lists is not *dated.*

(3). That the affidavit by the sheriff is not *signed* by him, though duly certified by the officer before whom it was made.

The "agreed facts" (R. p. 12), as to these sales is as follows:

"7. That in the month of October, 1869, the sheriff of McDowell County made *sale* of the lands in said county returned delinquent for the non-payment of taxes of the years 1865 and 1866, and among the lands so returned delinquent and sold was said tract of 1200 acres described in said assessment, delinquent list and report of sale as follows:

'Fay, Eli and E. F. Harmon, 1200 acres Clayborne Ridge.'

And at the same sale the said sheriff also *sold* the lands in said county returned delinquent for the non-payment of taxes thereon of the years 1867 and 1868

and among the tracts so returned delinquent and sold was said tract described as follows: 'Fay, Eli and E. F. Harmon, 1200, Clayborne Ridge.' That at both said sales, that is to say, said sale under each of said delinquencies, said sheriff purchased said tract of land for the State of West Virginia, and made return thereof, and that said lands have never since been redeemed from said delinquencies or sales or either of them.

8. That the sales above referred to and the sheriff's report of same and the returns thereof, and the records of such returns in the County Court Clerk's Office was subject to such irregularities, if any, as are shown by the certificates or copies thereof filed therewith as part thereof, and, to be read herewith, marked '100' and '101.'"

These exhibits are found on page 19 and 20 of the record, and the only "irregularities" pretended are those above enumerated, absence of date of filing the sheriff's report, and absence of date and signature to the sheriff's affidavit.

For the statute then in force, under which these sales were made, see Ch. 31, Code of 1868; the parts pertinent are as follows:

Sec. 1. "There shall be a lien on all real estate for the taxes assessed thereon, from the first day of April of each year with interest thereon, etc."

By succeeding sections provision is made for the return, certification and sale by the sheriff, after due publication, of all lands delinquent, with provision that when the taxes and interest shall not be bid, the sheriff should buy in for the State, and further provision that whether bought in by individuals or for the State, the former owner might within one year redeem.

By Sec. 19, provision was made for a deed to the individual purchaser:

"After the expiration of the said one year, the purchaser of any real estate so sold and not redeemed shall obtain from the recorder of the county in which

the sale was made, a deed conveying the same, in which shall be recited all the material circumstances appearing in his office in relation to the sale. The *oath* and *certificate* annexed to any list, and the *disposition of the list*, need not be mentioned."

The next five sections provide for instances, such as the death of the purchaser, or a transfer by him, pending the year; and, by Sec. 25, the *effect* of the deed is declared:

"When the purchaser of any real estate so sold, his heirs or assigns, shall have obtained a deed therefor, according to the six preceding sections, and caused the same to be admitted to record in the office of the recorder of the county, in which such real estate or the greater part thereof may lie, such estate shall stand vested in the grantee in such deed in and to said real estate as was vested in the *party assessed with the taxes* for which it was sold or as was vested in the heirs or devisees of such party, if he be dead, or as was vested *in any person* or persons claiming said real estate, under, by or through such party or his heirs or devisees, or *in any other way whatever*, who have not in his or their *own name*, been charged on the assessor's books of the proper county or district with the taxes on said real estate for the year or years for the taxes of which the same was so sold, and actually paid the same as required by law at the commencement of or at any time during the year or years for which said taxes were assessed, *notwithstanding any irregularity in the proceedings under which the said grantee claims* title, unless such irregularity appear on the face of the proceedings of record in the office of the record and *be such as materially to prejudice the rights of the owner* whose real estate is sold."

By Sec. 29:

"In all cases in which a question shall arise as to any such *sale* or *deed* or the *effect thereof*, such deed shall be *prima facie* evidence against the owner or owners, legal and equitable, of the real estate at the time it was sold, his or their heirs and assigns, and all other persons who might have redeemed the same, within one year as hereinbefore provided, and *con-*

*clusive* evidence against all other persons that the person named in the deed as recorder was such, that the material facts therein recited are true, and that such estate as is mentioned in the twenty-fifth section of this chapter, vested in the grantee in the deed."

By section 31, as to purchases by the State, it is provided:

"When any real estate is offered for sale as aforesaid and no person present bids the amount to satisfy the State from the sale, the sheriff or collector shall purchase the same on behalf of the State for the taxes thereon, and the interest and damages on the same, and shall make out a list thereof under the following caption:

'List of Real Estate within the County of....., sold in the month (or months) of....., 18....., for the non-payment of taxes thereon for the year (or years) ....., and purchased for the State of West Virginia.'

Underneath shall be the several columns mentioned in the tenth section with a like caption to each column, omitting, however, the column headed, 'Name of Purchaser.' The officer making out the said lists shall *make oath* that it contains a true account of the real estate within his county purchased by him for the State during the year, and return the list with a *certificate* of the oath attached, to the recorder of the county within ten days after such sale, who shall, within twenty days after such return, make an accurate copy thereof in a well bound book and transmit the original to the auditor."

By section 32 it is provided what the *effect* of such purchase shall be.

"The auditor shall cause all the lists received in his office under the preceding section to be recorded in a well bound book, and *all such estates*, right, title and interest in the real estate mentioned in such lists *as would have vested in an individual purchaser* there-

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> of at such sale *who had obtained proper deeds therefor and caused them to be admitted to record in the proper office*, shall be by the sale and the purchase thereof on behalf of the State, *vested in the State*, without any deed or other conveyance therefor to the State, subject however to the right of redemption mentioned in the next section."

Section 33 provides that by payment of the taxes to the auditor within a year, the lands so bought might be redeemed, but not thereafter.

It will be observed, that the taxes were first made a *lien*, to be enforced, on default, by sale by the sheriff, which should pass all right, title and estate, not only of the person *assessed*, but of *all persons not assessed* and paying the tax for such year, subject always to right of redemption within a year; that, no "irregularity" not appearing in the office, and then none *not materially prejudicing* the owner, should impair the sale; and, that the deed should be *prima facie* evidence against the *former owner* that the estate mentioned in section 25, *was vested in the grantee;* and *conclusive* evidence against all others.

That, upon failure of bidders, the sheriff should buy for the State, and such purchase at once operate to vest in the State such title as a *proper deed* would have vested in an individual purchaser, but in like manner subject to redemption within the year.

As the alleged "irregularity" in that the sheriff's oath is not *dated* nor *signed* by him, there is no substance; the statute required neither; the oath was duly *made* in the words of the statute, and duly *certified* by officer taking it. The statute did not in case of *purchases by the State*, require the affiant to "subscribe" the oath as it did in case of purchases by individuals, (section 12); the mention of it in the one case and omission of it in the other is expressive of legislative intent that in the latter case it was not intended. While as to "individual purchases," in view of the express requirement as to them, the Courts have regarded it; we submit these

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cases have no application to purchases *by the State,* under the above differently worded provision; and as to the absence of the unrequired "date" to the affidavit, no place for such is provided for in the prescribed form and in no instance has this omission been held material.

Coming then to the only other criticism of these sales, the failure of the recorder to "note the date" of the return of the sales lists to his office; neither was this required by statute, though some Courts, in some cases of individual purchases have, in their eagerness to despoil tax purchases, read it into the statute (see cases cited by the plaintiffs) and that too notwithstanding the express enactment that the deed should be operative.

> "Notwithstanding any irregularity in the proceeding under which said grantee claims title, unless such irregularity appears on the *face of the proceedings* of record in the office of the recorder, and be of such as *materially* to *prejudice* the right of the owner whose real estate was sold."

While as to the effect of the alleged irregularities there is conflict among the cases, under those best considered it is held they are not of substance when applied to purchases by the State. The Court's attention is especially asked to the forcible language of Judge Dent in his first written opinion in *Stockton vs. Craig,* 56 W. Va., 464, but not used in the published opinion in the case perhaps because in effect used in *Mosser vs. Moore,* 56 W. Va., 478, hereinafter quoted infra p. 30

## THE SALES OF 1869 WERE, AT MOST VOIDABLE ONLY:

Even if the proceedings were, as a matter of law, defective because of the supposed "irregularities" the plaintiffs cannot take advantage of it *in this action,* because the alleged defects are such as only at most to render the sales voidable, not *void,* wherefore the attack must be *direct* if at all, and not made collaterally as here attempted.

As already shown, the "sale" to the State, has the same force and effect as a "deed" to the individual. Code 23, Ch. 31.

Defective tax sales, though voidable, have legal force and effect until avoided by proper proceeding. They may ripen into good title by adverse possession. *State vs. Harman*, 57 W. Va., 447; they also constitute clouds on titles, *Rich vs. Braxton*, 158 U. S., 378; they are *prima facie* title against the owners, and *conclusive* against third parties; they can only in any case, even by the owner, be avoided by refunding to the purchaser the money paid by him with all taxes and costs; *Mosser vs. Moore*, 56 W. Va., 478. The above sales of 1869, even if irregular, are but *voidable*, not *void;* and being voidable only, can not be collaterally attacked. The loose use of the word "void" in many cases is misleading, being employed in the sense of *"voidable"* only.

> "Acts not done in strict pursuance of directory provisions of law are not necessarily void, though as to the proper parties applying in the *proper manner* and at the proper time, they may so declared."

*Sydnor vs. Roberts*, 65 Am. Dec., 84.

> "These words (void, etc.), are often used in the sense of *avoidable merely;* that is, *capable of being avoided*, and not as meaning that the act or transaction is *an absolute nullity*, as if it had never existed, incapable of giving rise to any rights or obligations under any circumstances."

*Ewell vs. Daggs*, 108 U. S., 143.

In *Alexander vs. Nelson*, 42 Ala., 463, it is said that:

> "The true distinction between 'void' and 'voidable' acts, orders and judgments is that the former can always be assailed in *any proceeding*, and the latter in a *direct* proceeding only."

A voidable instrument can not be impeached or attacked collaterally, but only by direct proceeding for that purpose.

*Black on Judgments*, Secs. 251-252.
*Harrison vs. Wallton*, 95 Va., 727.
12 Am. and Eng. Enc. Law (1 Ed.), p. 147.

As said by Judge Dent in construing these very laws, in his first opinion in *Stockton vs. Craig — supra:* /8.

"If the land owner owed the taxes and the land was returned as delinquent for non-payment thereof, and was afterwards sold therefor, and purchased by the State, with absence of fraud clearly alleged, and proved, no defect in the proceedings could possibly render the title subject to *collateral attack*, but the sale would be *voidable*, not by reason of any defect or omission in the proceedings under Sec. 25, Ch. 30, Code, but by redemption on the payment of taxes, costs and expenses fixed by law. If the lands are not redeemed then the State's title becomes absolute and unimpeachable except for fraud alleged and proved."

"A sale to the State is nothing more than a forfeiture for non-payment of taxes and amounts to no more than a mortgage or security for a lien already possessed. The sole cure for it is redemption made in time. Redemption can always be made as long as the title remains in the State, and this is until the mortgage is foreclosed by judicial sale, or the title is vested in adverse claimants by the constitution. The State merely resumes its own by reason of the dereliction of the tax payer who has broken the covenant by which he first received and must continue to hold his title."

"All the State wants is its taxes, costs and expenses. The land owner having the right to redeem, and being under obligations by reason of his delinquency, to pay the State's claim against the land without regard to the provision of section 25, chapter 31, would have no right on being accorded the privileges of redemption to *attack the State's title for any defect of any kind or description in the proceedings for the sale of such land*, for this would be inequitable towards the State and would amount to the same thing as bringing a separate suit against the State to avoid its title. He can have the State's title in only one way,

and, that is by paying the State's charges against the land, and this he can do without showing any defect in its title. A delinquent tax payer who seeks equity should do equity, and *he should not be permitted to attack the title of land held by the State by reason of his delinquency until he makes good such delinquency to the State*, in other words, *redeems his land*. In the suit brought by the State the land owner is permitted to file his petition for the purpose of redemption, and not for the purpose of attacking the State's title, section 17, chapter 105, Code. Prior to the enactment of chapter 95, acts 1882, the land owner was not even entitled to be a party to the proceedings, and there was no way in which he could assail the State's title. *McClure vs. Maitland*, 24 W. Va., 563. Nor does the law permit him to do so now. He has the right of redemption and with this he should be satisfied. So there is no way in which the State's title can or ought to be *directly assailed* by the land owner and the 'curative provisions' of section 25, chapter 31, are *unnecessary* to *protect the State*. It needs no such protection. As to third parties who in some collateral proceeding assail the title of those claiming under the State the curative provisions of section 25, chapter 31, would protect the title of an individual, hence the necessity of disapproving of the first three points in the syllabus of *McGhee vs. Sampselle* as not stating the law correctly and being misleading. If, however, the land owners fail or refuse to redeem, the State's title becomes indefeasible, *and it cannot be collaterally attacked by either the land owner or third parties*. Hence the curative provisions are unnecessary so far as the *State's title* is concerned. The land owners having owed the taxes and having permitted the land to be returned delinquent, to be sold and to be purchased by the State, and not having redeemed the same, are *estopped* both by the curative provisions of section 25, chapter 31, Code, *and by their conduct* from assailing in this collateral manner the title of the State as void for any defects or irregularities in the proceedings by which the State acquired title."

And as said by the same Judge, in *Mosser vs. Moore*, 56 W. Va., 478-490, discussing section 25 as amended, with its

curative provisions but drawing the vital distinction between want of "authority in the officer" and mere irregularity in the execution of his power:

> "Under section 25, no irregularity, error or mistake in the tax proceedings, however gross, is sufficient to render a tax deed *void*. Independent of such section, any irregularity which vitiates the *power* to *sell*, will render the deed void. If there is *no assessment of taxes*, or it is for any reason illegal, if the land has not been returned delinquent, or has not been certified to the officer for sale, or has not been sold, *then* the tax deed would be void, for all these elements are necessary to give to the clerk authority to make the deed. But all mistakes, errors and omissions in carrying out these essential steps are mere *irregularities* in the proceedings, none of which are sufficient to justify the setting aside or vacating the deed as *voidable* unless it 'be such as materially to prejudice and mislead the owner of the real estate sold, as to what portion of his real estate was so sold, and when and for what years it was sold, or the name of the purchaser thereof,' and *not then* unless the owner would have redeemed the same had it not been for such irregularity, and *not then* unless the owner *pay* or *tender* a sufficient sum to the tax purchaser or his representative *to redeem the same.*"

The plaintiffs lay great stress upon the holding that the curative provisions of the Act of 1882 are not retroactive; though this be true, in all the cases except *McGhee vs. Sampselle*, it is held, as declared by the statutes, that the State by her purchase stands invested with the same title that an individual purchaser would have *under a "proper deed,"* made by section 29 *prima facie* against the owner, the *conclusive* against all others. As shown by Judge Dent, unless the defect went to the *power of the officer to sell*, without any curative act the sale was good until avoided in a direct proceeding upon allegation and proof of material prejudice, and that but for it, the owner would, in fact, have redeemed. The distinction by Judge Dent between *want of authority* in the offi-

cer selling and irregularity in the *manner of* selling, is of the essence of the questions involved, and exists, as he shows, independent of the Act of 1882.

The agreed statement of facts read in light of the foregoing interpretation of the statute puts the Fay-Austin title, because of these tax sales whether they be treated as valid or voidable only, in the State, and it having never been divested by redemption or otherwise, is still *outstanding;* and the plaintiffs, for want of it, are barred of a recovery here; and this, whether the curative provision of the Act of 1882 is applied or not.

We desire to especially call the Court's attention to the fact that each and every one of the cases cited and relied on to defeat the sale of 1869 were cases of *direct* proceedings, and not one of *collateral* attack.

## FORFEITURE FOR NON-ENTRY SINCE 1869.

But should the Court hold, as did the trial Court, that there was no forfeiture for failure to enter these lands in 1869, for the years 1860 to 1864 inclusive, and that the sales to the State in 1869 were void, wherefore the State took no title by them, nevertheless, beyond peradventure, they were forfeited for the *subsequent omission* from the land books of *1870* to *1874*, and *since*.

By clause 6 of the "agreed facts" R. p. 12, it was agreed:

> "That the said tract of land was *never* from the date of the patent, 1860, up to the present year, (1906), *assessed for taxation* or *entered upon the land books* of either the State of Virginia or this State or of any county of either of said States in the name of Eliza T. Fay or Samuel W. Austin, *or any one* claiming title thereto, in whole or in part, under, by or through *said patent*, except the years 1865, 1866, 1867, 1868 and 1869, as shown above, (the years for which the sales to the State were made), * * * * * * * And that *no taxes have been paid* on said land by *any one* during said period, save and except *by said trustees* (the defendants) and those under whom they derive their claim of title as hereinbefore set out."

By section 6 of Art. XIII. of the Constitution of West Virginia it is provided:

> "It shall be the *duty* of *every owner* of land to have it *entered* on the land books of the county in which it, or a part of it, is situated, and *cause himself to be charged with the taxes thereon,* and *pay* the same. When for any five successive years after 1869, the owner of any tract of land containing 1000 acres or more, shall not have been charged on such books with State taxes on said land, then by operation hereof, the land shall be forfeited and the title thereto vested in the State."

As shown, the plaintiffs in this case admit their default — that the lands have never been entered since the date of the patent, 1860, except for the years 1865, to 1869, for which years they were delinquent and sold to the State — and that they have never, during all this period, more than fifty years, paid one cent of taxes.

But seek to *excuse* themselves for their disregard of this constitutional duty, and from its penalty, in reliance on the following legislative enactment theretofore and still on the statute book; Code, Ch. 29, Sec. 23, i. e.

> "Real estate *purchased* for the State at a sale for taxes shall not be thereafter entered on the land books, but the auditor shall keep a register thereof. But when any real estate appears from the auditor's certificate to have been *redeemed*, the same shall be replaced on the land book in the name of the *former* owner or his grantee; when real estate is sold to *individual* for taxes, the assessor shall note in his land book the number of acres sold, but shall continue the land upon said book in the name of the *former owner* until the purchaser obtains a deed therefor."

And cite in support, the case of *Sayers vs. Burkhart,* 29 C. C. A., 137, wherein it was said:

> "Where lands have been *purchased* by the State at a tax sale, they cannot forfeit for non-entry on the

land books for taxation under the statute of West Virginia, which provides that lands so *sold* shall not thereafter be entered for taxation, unless *redeemed.*"

Neither this statute, nor the case relied on, sustain the plaintiffs' contention. The statute speaks of a *valid,* not a *void,* sale to the State, note the terms "purchased," "redeemed," "*former* owner," etc., and the decision but reiterated the language of the statute; furthermore, the Supreme Court of the State has repeatedly and uniformly construed the above section to apply only to *valid* sales and to exclude "void" ones;

See *Totten vs. Neighbert,* 41 W. Va., 800;
*Stockton vs. Craig,* 56 W. Va., 464, and
*Webb vs. Ritter,* 60 W. Va., 193.

The *Burkhart* case, as reported, nowhere suggests that the sale under consideration was a *void* one, but follows the case of *Totten vs. Neighbert* as applying the statute to a valid sale only; and in the case of *Stockton vs. Craig,* following it, the Court, after full consideration found it did not in any sense sustain the plaintiff's contention here that a "void sale" either required or justified omission from the books or prevented the lands from being restored on request of the owner in discharge of his constitutional duty. The *Burkhart case* held only that:

> "Lands will not be declared forfeited for non-entry in cases where the *statute law provided that it should be omitted* from the land books."

And does not purport to construe the statute to apply to lands *attempted* to be, but not in fact, sold.

The case of *Totten vs. Neighbert,* cited by the plaintiffs, is direct authority *against* their position; there the tax sale was a *valid* one and not a void one. On page 804, the Court says:

> "It is *admitted,* in accordance with the plain letter of the law, that after the land in controversy had been twice returned delinquent, sold and *pur-*

> *chased* by the State, the State became *the indefeasible owner* thereof except as to the statutory privilege accorded to the plaintiff of *redeeming* the same, *such* being the case, the Clerk of the County Court of Logan County had no authority to place the land on the land books for the year 1883 and 1884, but he is expressly forbidden so to do by section 23, chapter 12, Acts of 1881."

Note, that in the Totten case; it was *"admitted"* that under the sale there under consideration, the State had become *"the indefeasible owner"* of the land, subject only to privilege of redemption, and the ownership of the State is made justification for applying the statute upon the ground that the *State's* lands are not taxable. Were this admitted in the case at bar, that the State, by the sales of 1869, became the "indefeasible owner," then we would need go no further, for no *redemption* is pretended.

But instead, the plaintiffs here, as they needs must do to escape the sales of 1869, *deny* that the State, by them, became "the indefeasible owner," and insist, as they needs must do, that those sales are *"void"* for all purposes, they say; see their brief, page 19:

> "It is clear therefore that both, under the law as it stood in 1869, and as it stands today, as announced in the decisions of both the State and Federal Courts, the *attempted* sale of the Fay land to the State of West Virginia for the taxes of 1865, 6, 7 and 8, *was void;* that *the State acquired no title."*

They, as they needs must do, blow hot and cold with the same breath. To *escape these sales,* they say they were not "sales" only *"attempted"* sales, *void,* and that "the State acquired no title;" then, to escape the forfeiture for *subsequent non-entry,* they invoke them as vesting "indefeasible title" in the State, in order to get in under the statute which excuses the *"State lands"* from entry.

It matters little to the defendants, as to which horn of the dilemma is taken, but we do insist that the plaintiffs cannot *avoid* these sales for one purpose and validate them for another.

Both the *Totten* case, and the *Burkhart* case, were shortly afterwards fully considered by the Supreme Court of the State in the case of *Stockton vs. Craig*, 56 W. Va., 464, and there held to support, and not oppose, the construction claimed for the statute by the defendants here. The Court there said:

> "Section 10, chapter 54, Acts of 1875, as amended and re-enacted by section 10, chapter 12, Acts of 1881, and now in force as section 29, Code, authorizes the assessor or clerk of the County Court to restore to the land books at the instance of the owner, any lands omitted therefrom by reason of a sale to the State for delinquent taxes, if such sale is for any cause *illegal* and *invalid*, within five years from the time such lands are omitted from such books; and *the failure of the owner* to have such lands so restored within such time, *subjects them to forfeiture*, under section 6 of Article XIII, Constitution, and section 39, chapter 31, Code."

This case was the first in the State in which a *"void"* sale had been set up as excuse for subsequent non-entry, and the Court, distinguishing the *Neighbert* and the *Burkhardt* cases, met the issue squarely, and notwithstanding the assaults by the plaintiffs in error, have ever since consistently and uniformly adhered to it and to the construction there given to the statute, the only one permissible or possible under any rule of construction, and the only one consistent with the Constitution; any other would have but made the statute a legislative *attempt* to defeat a self-executing provision of the organic law; to prevent the "owner of land" from discharging a constitutional duty; to excuse him from entering his land for taxation, and from payment of taxes; and this, though the Constitution was emphatic, unambiguous and self-acting. The Court, in *Stockton vs. Craig*, adopted the only construction,

permitted by the *plain language* of the Act and made the distinction between "lands *purchased* for the State" and "lands *attempted* to be purchased" but *not* purchased. It adopted the only construction, within the *purpose* of the Act, viz: to remove from the books lands *owned* by the State, and therefore *not taxable.* As said by the Court in *State vs. Snyder,* 64 W. Va., 660:

> "A statute should be so read and applied as to make it accord with the *spirit, purposes* and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject-matter, whether constitutional, statutory or common, and intended the statute to *harmonize completely with same* and *aid in the effectuation* of the general purpose and design thereof."

The criticisms of the *Stockton case* by the plaintiffs are not merited, but born of their necessities. The same question was again up in *Webb vs. Ritter,* 60 W. Va., 193, and again decided the same way, the only judge hesitating in the *Stockton* case, *concurring* in this; held:

> "An *invalid* sale of lands to the State for nonpayment of taxes does *not* relieve the owner thereof *from the duty of causing same to be kept on the land books and charged with taxes,* in order to prevent forfeiture of the title, under section 6 of Article XIII of the Constitution."

The Court, in its opinion, in which all the judges concurred, said:

> "The mandate of the constitution to *every* land owner is, that he *shall* have his land *entered on the land books* of the county in which it, or a part of it, is situated, and *cause himself to be charged with the taxes* thereon, and *pay the same.* Since an *invalid* sale to the State, *does not divest the owner of his title* and vest it in the State, the land *still remains*

*the property of him who owned it at the time of the attempted sale.* It remains his for all purposes and is as clearly subject to taxation as *his property* thereafter *as if no attempt to sell it had been made.* He can defeat any proceeding by the State against the land, as hers, or by any person claiming the title through the State by virtue of the abortive sale. Nevertheless, under the theory advanced by counsel, he could, with impunity, suffer it to remain off the land books, and so enjoy a privilege denied by the organic law of the State to every other land owner, whose land is not in the same situation. The inevitable result would be two classes of land owners, tax-paying and non-tax-paying, and several classes of land, forfeitable, and non-forfeitable, salable for non-payment and unsalable. The durations of these anomalous qualities of non-taxableness, non-forfeitableness and unsalableness, attaching to certain tracts of land, would depend upon the number and length of the delays incident to proceedings on behalf of the State to vindicate her rights, relating to forfeited and purchased lands. Vast areas would be tied up for long periods of time, and this probable result must be deemed to have been foreseen. That body (the legislature) were aware also of the imperious command of the constitution that the title to any land omitted from the land books for five successive years should be forfeited and vested in the State by such omission, and that the language of the mandate contained no such exceptions as the statute, if given the effect it is said to have, would read into it."

## THE TOTTEN VS. NIGHBERT CASE.

The first judicial construction of section 23, Ch. 29, Code, as shown, was in *Totten vs. Nighbert,* 41 W. Va., 800, wherein it was held that land *vested* in the State by a *valid* sale, being *no longer* the property of an *individual*, taxable, but instead (by reason of such valid sale) the property of the *State,* and as such non-taxable, was within the above provision, and *was the thing contemplated by it;* and that, under this section, it was the clerk's duty to omit it — the *State's* land — *until* the title should pass *out of the State* into some one in whose hands it would be chargeable, wherefore, land after a *valid*

purchase by the State could not afterwards before divestiture of the State's title, be lawfully sold for *subsequent* taxes in the former owner's name. The gist of the decision was, that lands *owned by the State* were not subject to taxation *during such ownership,* and that a subsequent tax sale in the name of the former owner — one having at the time no interest — passed no title to the purchaser.

The opinion in the Totten case was by the same Judge who afterwards delivered the opinion in *Stockton vs. Craig* and therein interpreted, distinguished and applied it as we have done.

## SAYERS VS. BURKHARDT.

The next construction was in *Sayers vs. Burkhardt,* 29 C. C. A., 137. This decision, too, as reported, is distinctly *within* the statute's plain reading and true intent. Neither the *syllabi* nor anything in the opinion gives aught of the construction claimed by the plaintiffs. The Court's words were:

> "Where lands have been *purchased* by the State at a tax sale they cannot be forfeited for non-entry on the land books for taxation under the statute of West Virginia, which provides that lands *so sold* shall *not thereafter* be so entered for taxation, *unless redeemed.*"

"*Purchased* by the State:"—A *void* sale constituted no "purchase."

"*Unless redeemed:*"—None but lands *legally* sold need be "redeemed," or could be; wherefore, lands "purchased," and "subject for redemption" and they only, are within the letter or spirit of the above.

Moreover, the plaintiffs at bar claim their land to be *not* of the class *requiring redemption,* because, they say, the State's purchase was *void*—*no purchase* — only an *attempted* purchase. It follows then, that the "attempted" sale of 1869 so

relied upon for exemption does *not* belong to the class of sales considered, and decided upon in *Sayers vs. Burkhardt* and in *Totten vs. Nighbert;* note the Court's words in the latter:

> "It *is admitted* in accordance with the plain letter of the law, that after the land in controversy had been twice returned delinquent, *sold* and *purchased* by the State, the State became the *indefeasible owner thereof*, except as to the mere statutory privilege accorded to the plaintiff of *redeeming* the same. *Such* being the case, the clerk of the County Court of Logan County had no authority to place the lands on the books of 1883 and 1884," etc., 41 W. Va., 804.

How then, in the light of the above, if the sale was *void*, and the State took *nothing*, and the *plaintiffs* instead, *continued* the "*indefeasible owners*" of the land?

To help out the construction claimed for the *Burkhardt* case, counsel sought to inject matter *dehors* the record, in hope to cast a doubt on the sale there. We take it if the facts were as it is now claimed they were, the *distinction* now urged was not considered by the Court, else would some word have been vouchsafed in the opinion, upon so vital a matter as the annulment of the State Constitution. We find none; hence assume, as we have right to do from the case reported, that no such question was presented by the record considered, or meant to be decided, with or without intent to make the plaintiffs' contention law in this State.

Judge Dent, in the case of *Stockton vs. Craig*, 56 W. Va., 464, well says of *Sayers vs. Burkhardt*, that, properly understood, it does *not* give or *attempt* to give any such unwarranted construction to the statute. This, in justice to the Circuit Court of Appeals.

The plaintiffs, in their sore straits to bolster their construction of this case, in their brief, p. 21, say:

> "And the decision of *Sayers vs. Burkhardt* is referred to by Judge Brannon in *State vs. Jackson*, 56 W. Va., 558, at page 574, as sustaining the proposition that land cannot be forfeited for non-entry after a void sale to the State."

Reference to the page cited shows how unreliable plaintiffs' assertions are in general. The only reference of the judge to the case was,

> "And for this position *counsel* for Ritter rely on *Sayers vs. Burkhardt*, 29 C. C. A., 137. As these matters are being considered in *another case* before the Court, and are not necessary to the decision of this case, &c."

Plaintiffs do not tell this Court that that "other case" was *Stockton vs. Craig*, 56 W. Va., 464, wherein it was distinctly stated, as already shown, that the *Burkhardt* case, *did not* sustain the plaintiffs' claim. For the facts, see 56 W. Va., p. 472. No more does the concurring opinion of Judge Brannon in the latter case, or his reference to the *Burkhardt* case, quoted by the plaintiffs, confirm their claim for it, nor is Judge Brannon's opinion a *dissent*. He *concurs* in the *decree* of the Court adjudicating a forfeiture, and dismissing *Stockton's* bill, leaving open only as to himself the question as to Sec. 23, for future consideration.

But whatever the meaning or intent of *Sayers vs. Burkhardt*, the contrary of the plaintiffs' claim for it having been both before and since decided uniformly one way—"settled"—by the Supreme Court of the State of West Virginia, the question being one of *construction* of the *constitution and statutes of the State*, affecting *property rights*, the *title to real estate* in the State, the Federal decision, if in conflict, must under all rules, *yield;* and this, whether the construction by the Federal Court be *subsequent* or *prior* to the home interpretation, or whether it be right or wrong.

## STOCKTON VS. CRAIG.

As shown, in 1904, in the case of *Stockton vs. Craig, supra, Totten vs. Nighbert* was approved and followed; the question here involved being *there* distinctly raised, and decided. In

1878 Stockton's lands were bid in at a defective sale, for the State; and later, in a still more irregular proceeding by the commissioner of school lands, sold to one Craig. *Craig* went into possession, and paid taxes for more than five years. *Stockton* sued to set aside the sales; a "forfeiture for non-entry" was answered, to which reply was made that, though the sale to the State was void to *divest the plaintiff's title,* it was *good* to invoke section 23 of chapter 29 of the Code and *prevent* a forfeiture for non-entry; the trial Court held a "void sale," no sale, that it did not constitute a "purchase" by the State, and was not within the statute. The Supreme Court, in emphatic terms, affirmed the lower Court. For the syllabus and opinion sustained, see *infra* page 42-43

This was followed in 1906 by *Webb vs. Ritter:*

> "An *invalid* sale of lands to the State for non-payment of taxes does *not* relieve the owner thereof from the *duty* of *causing same to be kept on the land books* and charged with taxes, in order *to prevent forfeiture* of the title under section 6, of Article XIII of the Constitution." 60 W. Va., p. 193.

For excerpt from opinion, see page 28

And, notwithstanding the intimation in plaintiffs' brief; there are no cases in *West Virginia,* to the contrary.

The plaintiffs, to escape the force of the decisions in *Totten vs. Nighbert, Stockton vs. Craig* and *Webb vs. Ritter,* endeavor, as shown, to force an unnatural interpretation of the case of *Sayers vs. Burkhardt,* and to urge for it precedence over the three decisions of the Supreme Court of the State.

We answer:

First: That the interpretation so contended for is *unwarranted.*

Second: That the question involved being one of *construction* of the *State Constitution* and *State statute* — involving *property rights* thereunder, *title to realty* in this State — the Federal Courts must, under the decisions of this Court, adopt the interpretation of the State Court, whether

prior or subsequent, and without regard to its own notion as to its merits. The rule in such case, as by this Honorable Court many times laid down, is as follows:

> "In cases depending on the statutes of a State, and more especially in those *respecting title to lands*, this Court adopts the construction of the State, where that construction is settled and can be ascertained."

*Polk's Lessee vs. Wendell*, 9 Cranch, 98.

Again:

> "Such is also the law of the State whence the case comes to this Court. It is a rule of property there; and this Court is, therefore, *bound* to apply it in the case at hand, as if it were sitting as a *local Court in that State.*"

*Lloyd vs. Fulton*, 91 U. S., 479.

Again:

> "The construction of a 'State law' upon questions affecting the *titles to real property* in the State, by its highest Court, is binding upon the Federal Courts."

*Williams vs. Kirtland*, 13 Wal., 306.

Again:

> "In the construction of the 'statutes' of a State, and *especially those affecting titles to real property*, where no Federal question arises, this Court follows the adjudications of the highest Court of the State. Its interpretation is accepted as the *true* interpretation, whatever may be our opinion of its original soundness. It becomes a part of the statute *as much so as if incorporated into the body of it*, and in following the statute as thus interpreted, we only apply the local law of the place. As has often been remarked, infinite mischiefs would result if in con-

struing State statutes affecting titles to real property where no Federal question was involved, a different rule were adopted by the Federal Courts from that of the State Courts."

*Walker vs. Commissioners*, 17 Wal., 648.

Again:

"This Court will adopt the construction of a State statute settled in the Court of the State, though it may not accord with it in opinion."

*Board of Sup. vs. U. S.*, 18 Wal., 71.

See also:

*Troga R. R. vs. B. & C. R. R.*, 20 Wal., 137.
*Nichols vs. Levy*, 5 Wal., 433.
*Beauregard vs. New Orleans*, 18 How., 497.
*Fisher vs. Haldeman*, 20 How., 186.
*League vs. Egery*, 24 How., 186.
*Christy vs. Pridgeon*, 4 Wal., 196.
*Gardner vs. Collins*, 2 Pet., 58.
*Barrett vs. Holmes*, 102 U. S., 635.

Further, as said in *Liffingwell vs. Warren*, 2 Black, 599:

"If the highest judicial tribunal of a State adopts new views as to the proper construction of a statute and reverses its former decisions, this Court will follow the latest settled adjudications."

Again, even though the Federal Court first construe the statute, yet if there subsequently be an adverse construction by the State Court, it will abandon its own construction and follow that of the later State Court decisions. See *Suydam vs. Williamson*, 24 How., 427, i. e.—

SYL.

"Where the subject of the dispute is *real property situated within a State*, her laws exclusively govern in respect to the rights of the parties, the

modes of transfer, and the solemnities which should accompany them. The power to establish Federal Courts, and to endow them with a jurisdiction, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign.

Where a contrary opinion to that expressed by this Court has prevailed in the Courts of a State, and become a rule of property there, this Court, without re-examining their own opinion, or making any attempt to account for or to reconcile the difference, will apply the rule adopted in such State, to the determination of controversies existing there."

Opinion:

"The constitution of this Court requires it to follow the laws of the several States whenever they properly apply; and the habit of the Court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, *especially when applied to the title to lands.* Upon cases like the present, the relation of the Courts of the United States to a State is the same as that of her own tribunals. They administer the laws of the State, and to fulfill that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion."

And especially, see citations in the above case.

See also:

*U. S. vs. Morrison*, 4 Pet., 124.
*Green vs. Neal*, 6 Pet., 291.

The reason of the rule is so succintly stated in the case last cited as to excuse quoting at some length:

"The exposition forms a part of the 'local law' and is binding on all the people of the State and its inferior judicial tribunals. It is emphatically the law

of the State which the Federal Court while sitting within the State, and this Court, when a case is brought before them, is called upon to enforce. If the rule, as settled, should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

If the construction of the highest tribunal of the State forms a part of the statute law as much as the enactment by the legislature, how can this Court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute, and why should not the same rule apply where the judicial branch of the State government, in the exercise of its acknowledged functions, should by construction give a different effect to a statute from what had at first been given it? The charge of inconsistency might be made with more force and propriety against the Federal tribunals for a disregard of the *local law*, and yet they reject the *exposition* of that law which forms a part of it. It is no answer to this objection that a *different* exposition was formerly given to the act, *which was adopted by the Federal Court.* The inquiry is, *what is the settled law of the State at the time the decision is made.* This constitutes the rule of property in the State, *by which the rights of litigants must be determined.*"

While minor exceptions to the rule appear in instances as to *personal* rights, none have been found where the title to *real property* was involved. As already shown, in West Virginia, the provision of the Constitution and of the statute, has thrice, and thrice only, been *directly* before the Supreme Court of that State; each time it received in unequivocal terms the same construction, one which has never been departed from or questioned by that Court. The construction thus given, is a *part* of the "statute law" *now*, and "constitutes the rule of property in the State by which the *rights* of the litigants must be determined."

As said by Mr. Justice Miller in *Taylor vs. Secor:*

"But, if for no other reason, we should reverse the decrees of the Circuit Court in these cases, because the same questions, involving the same consideration

here urged upon us have been decided by the Supreme Court of the State of Illinois in a manner which leads to a reversal of them. These questions all grew out of the validity and the construction of the *tax law* involved in the present cases. As the whole matter, then, concerns the validity of a State law *as affected by the constitution of the State*, that question, and the other one of the *true construction of that statute*, belongs to the class of questions in regard to which this Court still holds, with some few exceptions, that the decisions of the State Courts are to be accepted as the rule of decision for the Federal Courts."

*Taylor vs. Secor*, 92 U. S., 575.

"There can be no class of laws more strictly local in their character, and which more directly concern *real property*, than laws *imposing tax on lands, and subjecting the lands to sale* for unpaid taxes. They not only constitute *a rule of property*, but *their construction by the Courts of the State should be followed by the Courts of the United States with equal, if not with greater strictness, than any other class of laws.*

*Games vs. Dunn*, 14 Pet., 322.

"The decisions of the highest Court of a State establishing a rule of property as to the *effect of a tax deed* will be followed by this Court."

*Page vs. Pumpelly*, 115 U. S., 454.

"It is peculiarly the province of the highest Court of a State to decide whether or not the *method pursued in the assessment and collection of taxes* is in conformity with the law of the State, and *its* decision thereon *is controlling.*"

*Bailey vs. Magwire*, 22 Wall., 215.
*Lane Co. vs. Oregon*, 7 Wall., 71.

On the class of questions, where the construction of State statutes affecting the title to lands is to be ascertained, the Supreme Court of the United States follows the *last* decision of the Supreme Court of the State.

*Townsend vs. Todd*, 91 U. S., 452.
*Venice vs. Murdock*, 92 U. S., 494.
*Bauserman vs. Bleenk*, 147 U. S. Sup. Ct., 647.
Curtis on Jurisdiction, U. S. Courts, p. 233, Note.
*Webster vs. Cooper*, 14 How., 504.
*Lessee vs. Wendell et als.*, 9 Cranch, 98.

"Where the question upon the construction of the statute of a State *relative to real property* has been settled by *any* judicial decision in the State where the land lies, this Court upon the uniform principles adopted by it, would recognize that decision as a *part of the local law.*"

*Gardner vs. Collins*, 2 Pet., 58.

See also:

*Barrett vs. Holmes*, 102 U. S., 635.
*Nichol vs. Levy*, 5 Wall., 433.

"Such is also the law of the State whence this case comes to this Court. It is a *rule of property* there; and this Court is, therefore *bound* to apply it in the case at hand, as if *it were sitting as a local Court in that State.*"

*Lloyd vs. Fulton*, 91 U. S., 479.

"A fixed and received construction of their respective statutes in their own Courts makes, in fact, a part of the statute laws of the country.

Where these decisions make *a rule of property* in a State, this Court receives them as having a *binding force* almost equivalent to *positive law.*"

*Christy vs. Pridgeon*, 4 Wall., 196.

"The construction of the State law upon a question affecting the *titles to real property* in the State by its highest Court, *is binding upon the Federal Court.*"

*Williams vs. Kirtland*, 13 Wall., 306.

For other cases in point, see:

*Beauregard vs. New Orleans*, 18 How., 497.
*Fisher vs. Haldeman*, 20 How., 186.
*League vs. Egery*, 24 How., 264.
*Snyder vs. Williamson*, 24 How., 427.

"In the construction of statutes of the State, and *especially* those affecting title to real property, where no Federal question arises, this Court follows the adjudications of the highest Court of the State. Its interpretation is accepted as the true interpretation, whatever may be the opinion of this Court of its original soundness."

*Walker vs. Marks*, 17 Wall., 648.

The fact, that this suit was brought, (though not tried) before the decisions of the State Court were handed down does not alter the situation. Much stronger is the case of the *United States vs. Morrison*, 4 Peters, 124, where the decision of the Circuit Court was reversed in order to follow the decision of the State Court rendered later. In the case of *Stutsman County vs. Wallace*, 142 U. S., 293, the territorial Court decided a point which was appealed to the United States Supreme Court. While the case was pending in that Court the territory was admitted as a State, and the Supreme Court of the new State decided the point contrary to the decision of the Supreme Court of the territory. This Court reversed the Supreme Court of the territory in order to follow the decision of the State Court. See also the case of *Green vs. The Lessee of Neal*, 6 Peters, 291, where this Court overruled two of its former decisions in order to follow the latest State decision.

That case, like this, was an ejectment; the statute of limitations of the State of Tennessee was under consideration. Every argument urged here for adhering to the case of *Burkhardt vs. Sayers* was urged there. That suit was brought

as this, while the Federal decision was in force. The Court well asks:

> "Are not the injurious effects on the interests of the citizens of a State as great refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other, has the effect to establish, in the State, *two rules of property.*"

To the general rule there seems to be these classified exceptions:

(1). Where the State is party to a contract. *Bank vs. Skilley,* 1 Black, 436.

(2). Special or private acts. *Williamson vs. Berry,* 8 How., 495.

(3). Where there is no State decision. In such case, there is, of course, no course open, but for the Federal Court to decide the case according to its own conception of the law, but as already pointed out, should the State Court refuse to follow the Federal Court, then the latter Court will reverse its former rule in order to follow the State Court.

(4). When State decisions are unsettled.

A reading of the cases, hereinbefore cited, discloses that the rule does not require a "long line" of uniform decisions. In many instances, there was but *one* decision of the State Court. Such was the case in *Carroll vs. Stafford,* 3 Howard, 460, where the Court held that:

> "The Courts of the United States adopt as a rule of decision the established construction of local laws. And it can not be material, whether such construction has been established by long usage, or a judicial decision."

Nor does the fact that the State Court *changes* its decision render the law thus applied, within the meaning of this exception. The only question to be determined is, what is

the State law at the time of the trial. If this can be determined, there is no uncertainty. See *Green vs. Neal*, 6 Peters, 291, already quoted from.

The plaintiffs, to escape the established law of this Court, that in the construction of State constitutions and statutes, and especially those involving *the title to real* estate and assessment and enforced collection of taxes, the Federal Courts are bound by the exposition of the local laws by the State Court of last resort, invoke exceptions four and five above;

*First:* They say, the case of *Stockton vs. Craig*, does not "settle" the law in *West Virginia;* a fuller statement of it will therefore be pardoned.

By section 6, Article VIII, Const. W. Va.:

> "When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of Court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case."

By section 4 of the same Article, the decisions so made, are made *binding authority* upon the inferior Courts. Under these provisions of the Constitution, the Court prepared and prefixed to the *Stockton* case the following syllabus:

> "Section 10, chapter 54, Acts 1875, as amended and re-enacted by section 10, chapter 73, Acts 1879, as amended and re-enacted by section 10, chapter 12, Acts 1881, and now in force, as section 10, chapter 29, Code, authorize the assessor or the Clerk of the County Court, to restore to the land books, at the instance of the owner, any lands omitted therefrom by reason of a sale to the State for delinquent taxes, if such sale is for any cause, *illegal* and *invalid*, within five years from the time such lands are omitted from such books; *and the failure of the owner to have*

*such lands so restored to the proper books within such time subjects them to forfeiture under section 6, Article XIII, Const.*, and section 39, chapter 31, Code. (p. 473)."

In the opinion the Court, giving its reasons, says:

"The first question that demands consideration is as to whether the plaintiffs have shown any right to maintain this suit. It is admitted that the State purchased the lands in the year 1877, for the taxes delinquent thereon for the years 1875 and 1876, that notwithstanding such purchase the lands remained on the land books until the year 1879, when they were again sold for taxes and purchased by Craig, who never obtained a deed therefor. They were then dropped from the land books, and no attempt has ever been made by plaintiffs or those under whom they claim to restore them thereto. Thus plaintiffs' title has long since been forfeited to the State, both by constitution and statute for non-entry on the land books for a period of upwards of fifteen years, unless they have shown a good legal excuse for not making such entry. They do not claim that they ever made any effort to redeem the lands or have such entry made, but rest their case solely on the claim that because the State purchased these lands in the year 1877, for the taxes of the years 1875 and 1876, and that such sale was void because the sheriff failed to make his report in the time required, that such void sale *excused them from making any attempt to restore their lands to the land books*, and that the afterward continuance thereof on the land books up until the year 1879, was also illegal and void by reason of such sale. In short, that such sale was 'void' *to invest their title in the State* but 'valid' *to suspend their title in the air and furnish them a just, equitable excuse for their total lack of diligence and regard for the just duty they owed the State for more than twenty years, beginning with their delinquency for the year 1875.* Plaintiffs to sustain this contention rely on the decision of the Circuit Court of Appeals of the United States in *Sayers vs. Burkhardt*, 85 Fed. Rep., 246, which holds that 'where lands have been purchased by the State at tax sale, they cannot be forfeited for non-entry on the land books for taxation under the statute of West Virginia, which pro-

vides that the lands so sold shall not thereafter be entered for taxation unless redeemed.' Supported by the decision of this Court in the case of *Totten vs. Nighbert*, 41 W. Va., 800, in which it is held that 'where land has been sold for taxes and purchased for the State, and the Clerk of the County Court illegally places such land on the land books for succeeding years, in the former owner's name, and such land is again delinquent and sold by direction of the auditor for the taxes of such succeeding years, such sale is illegal and void, and the purchaser acquires no title by reason thereof.' These decisions are both in harmony with each other, and the statute which they construe, but *do not* in any sense sustain plaintiffs' contention, that if the sale to the State is *void*, the lands cannot be restored to the land books on request of the original owner in discharge of the requirements of the constitution and the statute. When the State once *acquires* the title of the land owner, either by purchase or forfeiture, its title becomes absolute, and it cannot be divested thereof in any other manner than is authorized by law. *State vs. Swann*, 46 W. Va., 128; *State vs. Sponagle*, 45 W. Va., 415 (32 S. E., 283); *McClure vs. Maitland*, 24 W. Va., 561. No title *remains* in the land owner, and *therefore* the *replacement* of the lands on the land books before redemption or sale would be illegal and void. If the sale to the State, however, is for any reason *illegal* and void, *no title passes*, but the title remains in the land owner, who is presumed to know the law; and *it is his duty to take steps immediately to restore the land to the proper books*, and if he *fails to do so* for five consecutive years, *such title as remains in him* is *forfeited to the State. Simpson vs. Edmiston*, 23 W. Va., 675. The clerk, the assessor and the land owner are all presumed to know the law, and presumed to know when a sale is illegal and void and their ignorance of law furnishes no excuse for disobedience thereof.

It is maintained that the clerk is a mere ministerial officer, and that it is his duty under his oath to obey the plain mandate of the statute without investigating the validity or invalidity of the sale. To the contrary, the law presumes that the clerk knows the law, and knowing it, knows when a sale is valid or invalid and must act accordingly to comply with his oath of office, and the plea of ignorance will fur-

nish him no excuse, and will not make any illegal act done by him legal. The clerk's ignorance cannot make that legal which is illegal, or make that illegal which is legal. The oath he takes is 'That he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment.' Though his skill and judgment may sometimes be in error, yet they cannot make law, after the manner of the errors of Courts of last resort, although they may excuse him from intentional wrong. While both the assessor and the clerk are administrative officers and belong to the administrative branch of the State government, yet in restoring lands to the land books improperly omitted therefrom, they act judicially.

Section 10, chapter 54, Acts 1875, provides that, 'When the assessor shall ascertain that there is any land in his district which has not been entered in his land book, or after being so entered, has from any cause, been omitted for one or more years, he shall make an entry thereof, and of the name of the owner, and shall charge the same with all the taxes which should have been charged or collected thereon since the twentieth day of June, 1863, with lawful interest thereon.' By section 10, chapter 73, Acts 1879, this section was amended and re-enacted by adding thereto after the word 'omitted' 'for a period of less than five years,' in lieu of 'for one or more years,' thus subjecting it to the constitutional limit of forfeiture; and also omitted therefrom 'since the twentieth day of June, 1863.' By chapter 12, Acts 1881, the clerk of the County Court is directed to make out the land books and authorized to correct any mistakes he may discover therein. Section 10, is continued in this act substantially as formerly, with the following clause added thereto: 'And if the clerk of the County Court make any such discovery' (that is, that any lands have been omitted therefrom for a period of less than five years) 'he shall enter the same in the land books and inform the proper assessor thereof, who shall assess the same as aforesaid and certify his assessment to the clerk; and the clerk shall thereupon, charge said real estate with taxes as aforesaid.' This section materially unchanged has been continued to the present time. Section 10, chapter 29, Code. Thus both the clerk and the assessor in ascertaining what lands

have been improperly omitted from the land books for any cause are clothed with judicial powers often nominated *quasi* judicial, and when a land owner seeks to have his land restored to the land books because illegally omitted for any cause, the duty is imposed on them of investigating the grounds of illegality, and if found to be true, and forfeiture has not yet accrued, of restoring such lands with all unpaid taxes, with legal interest thereon chargeable against the same, to the land books. Thus the State is made whole, and the land owner redeems his land from delinquency and sale, and prevents forfeiture thereof.

In Welty's treatise on the law of assessment (section 25, p. 37), the law is stated as follows: 'In the exercise of the functions and in the discharge of the duties of his office, an assessor acts both judicially and ministerially.' That is, some of his acts are judicial and some ministerial. 'When it becomes necessary to determine a question of law or fact the act is judicial.' The acts of assessors in determining what property is liable to taxation are judicial in their character. Throop on Public Officers, 571; *Wheeling Bridge Co. vs. Paul, Judge*, 39 W. Va., 142; *Cunningham vs. Brown*, 39 W. Va., 588; *Charleston Bridge Co. vs. County Court*, 41 W. Va., 658.

It is therefore plain, that either the assessor or the clerk, *had authority to restore these lands to the land books on application of the owners at* any time before they became forfeited by reason of non-entry, *provided* the former purchase by the State was *illegal* or *void* for any cause, and having the power, it was incumbent on them *as a duty* to do so when thereto requested. Whatever title *remained* in the owners *became forfeited* to the State *after they had been off the land books for five consecutive years. Hence*, whether the sale to the State was *valid* or *invalid the land owners lost their title*, and it became absolutely vested in the State. *Having no title*, or no *suable interest in the subject-matter of the suit, they cannot maintain the same. King vs. Mullins*, 171 U. S., 404; *King vs. Panther Lumber Co.*, Id., 437."

"Having reached the conclusion that the plaintiffs have lost their title, whether the purchase by the State in 1877 is valid or invalid, it becomes wholly unnecessary to inquire into the *validity* of *such purchase;* for, the *afterwards forfeiture* for *non-entry*,

*renders the State's title,* though otherwise defective, *absolute* and *indefeasible.*"

There is no uncertain sound about either syllabus or opinion. The case made was identical with that here, the question the same, and the holding clear cut; and, the former cases, *Totten vs. Nighbert* and *Sayers vs. Burkhardt,* were not overlooked, but considered and distinguished, and held to *support* the conclusion reached. Under the Constitution of the State, this certainly "settled" the construction of section 23, chapter 29 of the Code. It is sought to detract from the weight of the decision by calling it the "majority opinion;" the *decision* was unanimous, that the lands were forfeited and that the plaintiff could not recover for that reason, four out of the five judges construing section 23 as claimed by the defendants here; the other concurring in the conclusion, but finding the plaintiffs' claim barred by *laches,* (the land there had been untaxed for fifteen years,— in the case at bar, *fifty* years)— Judge Brannon holding that fifteen years of neglect, being sufficient to defeat recovery, it was not necessary for him to pass on section 23, as to which he says:

"I cannot see *clearly* as yet," etc.

In the case next following, *Webb vs. Ritter,* 60 W. Va., 193, the Court gave emphatic approval of the construction given to the statute in *Stockton vs. Craig.* The *Webb* case as shown reiterated in forceful language, the holding in the *Stockton* case,— that the statute did not apply to *void* sales, but only to those, whereby the former owner was divested of the title, and by which the State became "indefeasible owner;" the holding and opinion in this, the *Webb* case has already been set out at length, and is here respectfully again referred to. As shown, the Courts of West Virginia had never theretofore, nor have they since held otherwise, but, in effect had long before in the *Totten* case, limited the section to "valid sales," and as far back as 1884, decided the

*Edmiston* case involving the same principles as stated by Judge Dent and hereinafter shown. In the Stockton case, the Court, in terms, excluded void sales from the operation of section 23, Ch. 29; and, in the *Webb case,* approved *Stockton vs. Craig*, and confirmed the theretofore uniform construction given in it. The question again arose in *State vs. Garnett,* decided in 1909, 66 S. E. R., p. 98, wherein the Court, speaking by Judge *Brannon*, without discussing the statute, treated the question as settled, and dismissed the suit as to the former owner *because the lands were "forfeited"* and as to the State because the forfeited title had under the Constitution, *vested in the defendants.*

Thus by an unbroken line of decisions from first to last, and (barring the reservation by one judge out of five,— by that judge thereafter abandoned), this statute has been held *not* to excuse the failure of the owner to enter his lands. We therefore, with confidence, dismiss the plaintiffs' claim that the decisions in West Virginia are "unsettled." Further this Court has never spoken on the question nor is there aught of authority holding that this Court is bound by decision of a Circuit Court rather than the State Supreme Court.

It is repeatedly asserted in plaintiffs' brief that the Courts of West Virginia have "shifted" their position. The cases referred to, if examined in connection with the statutes in force at the respective times, will show this criticism not well founded, but instead that the changes were due to changes in the statute from time to time made by the legislature in effort to give to tax sales stability and to the party purchasing at the instance of the State, the thing for which he paid and she received his money. An examination of these cases will further show them sales to *individuals*, and in no wise connected with any *forfeiture for non-entry* or with section 23 of chapter 29, except that of *Simpson vs. Edmiston, supra,* and a long line of cases built upon it, all establishing and confirming the *principles* involved in *Stockton vs. Craig* and *Webb vs. Ritter*, though the subject of consideration was, the

twin clause in the section;— that relating to purchases by individuals — requiring the clerk upon making a tax deed to transfer the land purported to have been sold, from the former owner to the purchaser — omitting it in the name of the delinquent;— holding only valid sales included; and, that such transfer in event of a void sale would *not* save a forfeiture for omission in the owners' name by reason of it.

## SIMPSON VS. EDMISTON.

In the pioneer case of *Simpson vs. Edmiston,* 23 W. Va., 675, decided in 1884, and cited in the Stockton case, it was held that where the tax deed was *void,* insufficient to divest the owners' title, the *duty remained with the owner to keep* the lands on the books in his own name and pay the taxes or else submit to a forfeiture for *non-entry,* notwithstanding the lands might for each year be entered in the name of the *tax purchaser* and the taxes paid by him.

### SYL. 8:

> "A purchaser of land sold for delinquent taxes after he acquires a deed therefor will be deemed as holding adversely to the person in whose name the land was sold, and *if such person denies the validity of the tax deed and still claims the land he must keep the land on the assessor's books in his name and pay the taxes thereon.* The payment of the taxes on such land by the *tax purchaser* in his own name will not inure to the benefit of the former owner," etc.

In case of a valid sale to an *individual,* the title passes upon execution of the *tax deed,* and the land is no longer chargeable to the former owner, but transferred on the land books to the *purchaser.* In case of a valid sale to the *State,* the title passes by operation of law, without any deed, and the lands as "State's lands" are *omitted* during *her ownership.* If the sale in either case be *invalid* — fail to pass the title —

the *original owner,* notwithstanding the attempted sale, *remains* the owner, subject to all the obligations of one, imposed as condition of his continued ownership, i. e., to cause the lands to be *entered* and *himself to be charged with the taxes* and to *pay the same.* Disregard of this duty carries with it the "penalty" beyond the power of the legislature, or the legal right of the Court, to avert. The statute is, in substance, the same in either case; and the decisions, upon the one, in *Simpson vs. Edmiston,* was adjudication of the *principles* involved in the other,— an adjudication, a construction, of section 6 of Article XIII of the Constitution and of the statutes in pursuance thereof, made nearly ten years before the case of *Burkhardt vs. Sayers.* This principle has never since been questioned. The case of *Simpson vs Edmiston* as to the above section, has been followed uniformly, and with approval, many times since, and is *still* the law of the land.

*State vs. West Branch Lumber Company,* 64 W. Va., 673.

Since *Stockton vs. Craig* and *Webb vs. Ritter,* the Supreme Court of Appeals of West Virginia has decided *State vs. West Branch Lumber Company,* 63 S. E. R., 372, and *State vs. Snyder,* 63 S. E. R., 385, both in December, 1908; and in harmony with those cases. In the *West Branch Lumber Company* case tax sales of 1870 were assailed directly in an equity suit as invalid for irregularities practically those relied on in the case at bar, and after these sales the land was omitted from the land books for more than five years; because of which, the West Branch Lumber Company claimed title, by forfeiture, possession and payment of taxes under color of the tax sales.

The opinion in the case is in part as follows:

> "The State proceeds upon the theory of a forfeiture for non-entry, not in the names of Corley and Momson or other tax deed grantees, or any one to whom the claim under the tax deed passed, but upon the theory of a forfeiture for non-entry in the name

of the Albright heirs and Giger, the tax deed being considered void, *in consequence whereof the payment of the taxes by one claiming under it does not, under the doctrine announced in Simpson vs. Edmiston, 23 W. Va., 675, as it has been applied in later decisions, protect the land from forfeiture.*"

"If the former owner *permits a forfeiture* of his title, (by non-entry) *after the execution of the tax deed,* the State, by this statute *passes it to the grantee* in the deed, by a release or grant thereof. Though the statute does not say this in terms, it necessarily implies such grant."

The forfeiture accrues to the State but this statute immediately passes the benefit of it to the tax deed purchaser. The owner may prevent the forfeiture by keeping the land taxed to him and the taxes paid, and so, remain in a position to assail and set aside the tax deed if it be void; but, if he neglect this for five successive years, his title is irretrievably lost by the consequent forfeiture, and the "grant" thereof to the purchaser is effected by the statute.

STATE VS. SNYDER, 64 W. VA., 659.

The opinion in the *Snyder* case is partly thus:

"The State proceeds upon the theory of a forfeiture for non-entry, not in the name of Cherry or any one to whom the claim under the tax deed passed, but upon the theory of a forfeiture for non-entry in the name of Snyder, *the tax deed being considered void, in consequence whereof payment of the taxes by one claiming under it does not, under the doctrine announced in Simpson vs. Edmiston, 23 W. Va., 675, as it has been applied* in later decisions, protect the land from forfeiture."

"We do *not* hold that no forfeiture has accrued under section 6 of Article XIII of the Constitution; on the contrary, we *adhere* to the *doctrine of forfeiture in the name of the former owner.*"

When it is considered, that the identical clause of section 23, chapter 29, has been three times construed the same way and never otherwise, and the twin clause of the same section involving the identical principle, since 1884, when first before the Court and uniformly since down to and including the cases of *State vs. Snyder* and *State vs. Lumber Co.*, in 1908, has in every instance received a like construction, it will be seen how little of reliance can be put on the broad assertions of the plaintiffs as to "shifting" of the State Court. There has been no shifting nor the shadow of a deviation from the one same straight obvious line. No statute of any State has ever received more frequent, constant and consistent construction by the Court of last resort than that here under consideration, this local law, affecting the title to lands in West Virginia, the assessment and collection of her taxes, and the enforcement of such collection. It would indeed be an anomaly if the validity of these titles, though of exact like kind, should depend on the *citizenship* of the claimant! As shown, this Honorable Court has many times held it would not tolerate, much less *create*, such a condition. Judge Dayton so held, on the trial of this case; and his judgment, and the opinion as to this, in support, to which the attention of this Court is asked, conforms to the established law.

## ACQUIRED RIGHTS.

Plaintiffs next invoke the "fifth" exception to the rule, that which protects rights acquired upon the faith and credit of the contrary Federal decision before an interpretation by the State Court.

The case at bar does not fit the niche. They have done absolutely *nothing* since 1860 — have acquired *no right* since then. The only right they ever had, was by virtue of the patent of fifty years ago. The statute construed, and which they invoke, was passed long subsequent; the construction they claim for it was first given, if ever, in the *Burkhardt*

case in 1896, thirty-six years after the patent, twelve years after the *Edmiston* case and after the *forfeiture* was many years old. In fact, until the *Burkhardt* case, it was never suspected by the plaintiffs that a question existed or could be raised as to the forfeiture of this land; and to the misconception of that decision is due this suit, and this terrorizing of the progressive owners who have converted it, a wilderness, into a bee hive of industry. How then, can these plaintiffs claim to have been *misled* or *prejudiced* by, or *to have acquired any rights under* their forced construction of *Sayers vs. Burkhardt?*

The inapplicability of the cases cited by the plaintiffs is apparent, even on most casual examination; and bespeak the weakness of a cause driven for want of something more in point to cite them. Those cases are:

*Burgess vs. Seligman,* 107 U. S., 20.

In this case, was involved a statute fixing the liability of stockholders of a corporation at its dissolution. After the case was decided in the U. S. Circuit Court, the State Court announced a different construction. In refusing to reverse the Circuit Court in order to follow the State Court, this Court gave the following reason for its action:

> "So when *contracts* and transactions have been *entered into* and *rights have accrued* thereon, *under a particular State of the decision of the State tribunal,* the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such have accrued."

But this Court, at the same time, approved the principle contended for by the defendants here. It said:

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are

> established which become *rules of property* and action in the State, and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the *law of real estate*, and the *construction of State Constitutions and statutes.*"

Note that here "contractual rights" had accrued before the change in decision, and upon faith of the then declared interpretation. The refusal of this Court to follow the change was *quoad* that situation only, and was put upon that ground, only; and even then excluded from the principles decided, cases like that at bar affecting title to real estate.

*Douglas vs. County of Pike*, 101 U. S., 677.

An act authorizing county bonds in aid of a railroad was upheld by the State Court, and before a change of decision on the faith of it, bonds were bought. Subsequently the State Court held the act unconstitutional. This Court sustained the sales made intermediately on the faith of the previous decisions and the then unquestioned holding as to the validity of the law, upon the sold ground of "rights acquired" *after* the first decisions and upon credit of them, and *before* the change of construction; giving the State decisions *quoad* the statute, the effect of legislative amendments at the respective dates of their rendition.

It will be observed here, too, that the *subject-matter* was one of "contracts," not "title to the real estate;" and the thing in action was a right acquired upon faith of then existing decisions,— not one existing, anterior to any judicial construction.

In *Rowan vs. Runnels*, 5 How., 133, the State of Mississippi had a constitutional provision as follows:

> "The introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, one thousand eight hundred and thirty-three."

The question arose in the case of *Grove vs. Slaughter,* (15 Peters, 449), as to whether it was necessary for the legislature to act, in order to make the provision effective. The Supreme Court of the United States decided the construction of the provision by the State Courts was unsettled and the clause to be not within itself prohibitive. Later the State Court held it self-operating. After the decision of the Federal Court and before the State decision, *Rowan & Harris,* citizens of Virginia, sold to one *Runnels,* a citizen of Mississippi, certain slaves, taking notes in payment. After the decision of the State Courts, Runnels refused to pay and suit was brought in the Federal Court. The recovery depended on whether the Federal Court should follow its former decision, or the decision of the State Court. This Court held by reason of the *contractual relations* entered into *on account of its former decision* it would follow it in the case at hand rather than that of the State Court. In the opinion, Chief Justice Taney says:

> "Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and from the time they are made will regard them as *conclusive* in all cases upon the *construction of their own constitution and laws.* But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this Court, were *lawfully* made."

*Pease vs. Peck,* 18 How., 595, involved the question, whether the phrase "beyond the seas," found in the original manuscript of a statute of limitations but not in the published law, was part of the statute. The Federal Court had formerly held them to be part of the statute. The decisions of the State Courts were conflicting. No rule of property or title to lands or assessment or collection of taxes was involved. The Court said:

> "In all cases where there is a *settled construction* of the laws of the State by its highest judicature,

established by admitted precedents it is the practice of the Courts of the United States *to receive and adopt them without criticism or further inquiry.* * * * * But when this Court has first decided a question arising under State laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a State Court, as in the case of *Rowan vs. Runnels,* 5 How., 139. When the decisions of the State Court are *not consistent,* we do not feel bound to follow the last if it is contrary to our own convictions, and much more is this the case where, after a *long course of consistent opinions,* some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of a former safe rule."

This authority in no wise fits the case at bar, where, as shown, the question involved is a rule of property, where the "long line of consistent opinions" is *in strict accord* with the *last* decision and with *all of the decisions* of the State Court on the subject, and where no right has been acquired under the claimed Federal decision.

*Bolles vs. Town of Brumfield,* 120 U. S., 759.

The town of Brumfield, in the year 1869, subscribed for certain stock in a railway company, and in the manner provided by law, issued bonds in payment of its subscription. At the time of the bond issue both the State and Federal Court had sustained the validity of such issues. In 1871 and after the bond issue, the State Court reversed its former holding. The United States Supreme Court in the above case held that the liability of the municipal corporation must be determined by the recognized law at the time the *bonds were issued* and the rights attached.

The case of *Barnum vs. Okalona,* 148 U. S., 393, was to the same effect.

For complete and exhaustive notes on all phases of this subject, see notes to *Wilson vs. Perrin,* 11 C. C. A., 71.

It will be noted that there are cited three classes of

cases under the head of the last class of exceptions. In the Mississippi case the parties had entered into a contract on faith of the former decision of the Federal Court and promissory notes had been given in discharge of the consideration named in the contract. The Court refused to hold that such notes were without consideration.

In the next class, the liability of stockholders in a corporation on its dissolution was involved. The stock had been issued and liabilities had been incurred on faith of a former decision. The rights had accrued before the State decision was handed down. The Federal Court in such case held that it was not bound to follow the State Court.

In the third class, innocent persons had bought bonds issued by a municipal corporation while both State and Federal Courts recognized their validity. The State Court reversed its former decision but the Federal Court refused to declare bonds bought on faith of its former decision invalid. In all these cases rights growing out of *contractual relations* were involved — rights that had attached *in reliance* upon the Federal decision and *prior* to the time of rendering the State decision which the Federal Court was afterwards asked to follow. In none was *real estate* or a *rule of property* involved.

We have only to mention the character of these cases to show how different they were from the one under consideration in which is certainly involved a "rule of property." On the decision in this case depends, whether or not numerous other persons who in the early history of the State of West Virginia had claim to wild lands and allowed them to become sold, the State, will now at this late period on some excuse or other, go into the *Federal Court* and maintain a suit against those in possession who have paid their taxes, when the *State Court* will *not* allow them to do so.

The mere fact that this suit was instituted prior to the rendering of the State decisions, relied upon, in no way puts this case outside the general rule. Whatever *rights* in this case the plaintiffs may have, originated in the *year 1860.*

They have entered into no contractual relations on the faith of the Burkhardt case, even should it be held susceptible of the construction given it by the plaintiffs.

In the case of *Barnes vs. Bee,* 138 Fed., 476, the decision was by the district Judge, the same learned Judge who held adversely to the plaintiffs on the trial of this case. There the statute involved was the "curative act" of 1882 as applied to *individual* sales, in no wise related to any question involved in the case here. The "conflicts" and "confusion" referred to, were not as to the effect of *omission of lands* after a *void* sale, but as to how far the curative act should be extended, an act not applicable nor invoked in the case at bar. The opinion of Judge Dayton, the Judge above quoted, on section 23 of chapter 29, is found in the record, page 55. After elaborate discussion of the section and as an original proposition reaching the conclusion contended for by the defendants, he says:

> "But independent of my own views of this question, I regard the conclusion reached by me *as inevitable* for another reason. The Supreme Court of Appeals of West Virginia has so held in two well considered cases very recently decided. These cases are
>
> *Stockton vs. Craig,* 56 W. Va., 464.
> *Webb vs. Ritter,* 54 S. E. Rep., 484.
>
> "It is, however, earnestly insisted by counsel for plaintiff that these cases are in direct conflict with the cases of *Totten vs. Nighbert* and *Sayers vs. Burkhardt.* This may be true although it is to be noted that the same Judge rendering the opinions in *Totten vs. Nighbert* and *Stockton vs. Craig,* strenuously insists in the latter that there is no conflict but complete harmony.
>
> It is not necessary for me to express an opinion as to this further than to call attention to the facts that *these last two cases directly and positively decide the exact question here involved* after careful review of all former decisions; that *there is no doubt or confusion in their rulings;* and that they are the *latest*

*decisions of the Court of last resort of this State.* not only construing its constitution and local statutes, but establishing by such construction a *rule of property in this State.*

Under such circumstances. I regard it necessary, under decisions of the Supreme Court by which I am bound, to follow these local decisions independent of any Federal decision prior to their enunciation."

*Polk vs. Wendell,* 9 Cranch, 98;
*Williams vs. Kirtland,* 13 Wall., 306;
*Walker vs. Commissioners,* 17 Wall., 648;
*Board of Supervision vs. U. S.,* 18 Wall., 71;
*Leffingwell vs. Warren,* 2 Black, 599;
*Suydam vs. Williamson,* 24 How., 427;
*Lloyd vs. Fulton,* 91 U. S., 479;
*Green vs. Neal,* 6 Pet., 291.

It is therefore manifest that the "conflicts" and "confusion" referred to in *Baines vs. Bee,* had no reference to any decision on the effect and proper construction of section 23 of chapter 29, as plaintiffs would intimate.

After citing the above cases, the plaintiffs, with characteristic recklessness, gravely tell this Court, (Plff's. brief, p. 30), that,

> "The cases show that if the Federal Courts have once construed a statute even if it relates to *limitations, taxation* or *other local matter,* they will not be bound to disregard their own rulings and follow the State Court's construing the statute differently. When this condition is presented, the *Federal Courts have uniformly exercised the prerogative of following and approving the construction of the statute whether State or Federal, which commends itself to the Court as the legal and proper construction.*"

This merits no further answer than reference to the quotations already given, but is worth noting in order that the Court may appreciate how necessary it is to take the other statements of their brief *cum grano salis,* and not lest those in relation to the case of *Stockton vs. Craig,* wherein they have

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set up straw men and proceed vigorously to demolish them; they pass by the case of *Webb vs. Ritter* without comment. These cases, when read, speak for themselves and relieve us of the burden of defense. To their logic add the cogent reasoning of Judge Dayton (R., pp. 54-5) and we have no apprehension of this Court's being side-tracked or misled by ingenuous but specious argument.

## THE SCHOOL LAND PROCEEDINGS OF 1882.

It is urged by the plaintiffs that the alleged defects in the proceedings against these lands by the commissioner of school lands in 1882 operated, without any act on the part of the delinquent patentees, or any request or even knowledge of theirs, to restore the title to them freed from all penalties for failure to "enter" the land or pay taxes, and gave to them (the plaintiffs) henceforth a perpetual *exemption* from taxation, they have not to *this day* paid or offered to redeem.

That, *because* under that "proceeding" the State has at a sale of the land "as waste and unappropriated" realized from the *defendants* a sum equal to the taxes the plaintiffs *should* have paid the moneys so paid by the defendants must be taken as paid for *their* (the plaintiffs') use and *in discharge* of *their* default; this notwithstanding their claim that the sale to the State in 1869 was *void* and therefore their title not subject to or *possible of sale* by the school commissioner in 1882; in short, that the sale of 1882 was good to *get the money* for their benefit, but *not* good to *pass the consideration* — the land for which it was paid — to the purchasers; that they, the plaintiffs, may *adopt* the school commissioner's sale to the extent of appropriating the proceeds to their obligation, and *repudiate* it as passing any title to those who paid the money. They would do as the youngster of nursery rhymes, "eat the cake and keep it, too."

Such a proposition, would put the law to shame for its very inequity; it refutes itself under the *reductio ad absurdum*.

If the school commissioner's sale was "void" as they contend, it was *void* for *all purposes.* If it was inadequate to divest the State's title in favor of the parties *who paid to her the purchase money,* to whom she *promised* the land and *intended* it to go, where then did it acquire sufficient vitality to *revest* the title in one *then* and *always theretofore* and *ever since* in default and *still* failing and refusing to pay one penny of taxes past or future or even to ask privilege for doing so? But this is not an open question. That the delinquent gets no benefit from the payment of the adverse claimant, is settled by the repeated decisions of the Supreme Court of West Virginia.

Held: In *Simpson vs. Edmiston,* 23 W. Va., 675.

"The payment of the taxes on such land by the tax purchaser in his own name will not inure to the benefit of the former owner."

And in *Stockton vs. Craig,* 56 W. Va., 464:

"The payment of taxes *by adverse claimants* of land under fraudulent and void tax decrees and tax deeds, *does not inure to the benefit of the delinquent owner,* so as to prevent the forfeiture of his title for non-entry on the land books."

And on page 475:

"In the present cases, there was no such judicial sale (an irregular school land sale) as would create or confirm a privity between the original owner and the purchasers, such owners even not parties to the proceedings, nor were they entitled to be. *McClure vs. Maitland,* 24 W. Va., 561. Their title was not sold, but it was only such title as the State had at that time. If any privity existed, it was between the State and the purchasers. If the State had no title then the decrees and deeds in pursuance thereof furnished mere color for the beginning of a new title, bringing this case clearly within the rule of *Simpson*

*vs. Edmiston*, 25 W. Va., 675. *State vs. McEldowney*, 54 W. Va., 695."

To the same effect:

*State vs. Snyder*, 64 W. Va., 659;
*State vs. Lumber Co.*, 64 W. Va., 673;
*State vs. Garnett*, 66 S. E., 98.

Further; a deed by a commissioner of school lands, being a "grant from the State," at the worst the purchaser could but be treated as a "junior patentee"—his claim, possession, and payment of taxes, as under "claim or color of title," adverse to the world, and for his own use. To him at least must be given as good standing as the *younger patentee*, in the fight against the *senior* grant. If such possession and payment of taxes did not operate to ripen the younger title into the *better*, then when and where could be conceived a case for that clause of the Constitution to operate upon which provides that the "forfeited title" *shall vest* in *such "claimant"* (other than the delinquent, his heirs or devisees) *as shall have been in possession for five years and paid the taxes during that period!*

Section 3 of Article XIII of the Constitution is as follows:

> "All title to lands in this State heretofore forfeited or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia or to this State or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or *hereafter* forfeited or treated as forfeited or escheated to the State, or purchased by it and become irredeemable not redeemed or released or otherwise disposed of, vested and remaining in this State, *shall be*, and is *hereby* transferred to and *vested in* any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees) for so much thereof as such person has, or shall have had actual, continuous possession of under *color* or *claim* of title for ten years, and who, or those under whom he claims shall have

paid the State taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees), for so much of said land as such person shall have title or *claim* to regularly derived, mediately or immediately from or under a grant from the Commonwealth of Virginia or this State, not forfeited, which but for the title forfeited would be valid, and who, or those under whom he claims has paid all State taxes charged or chargeable thereon for five successive years after 1865 or from the date of the grant, if it shall have issued since that year; or if there shall be no such person as aforesaid, then to any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs and devisees), for so much of said land as such person shall have had *claim* to and actual, continuous possession of, under color of title for any five successive years after 1865 and have paid all State taxes charged or chargeable thereon for said period."

Further; the Supreme Court of the State, in construing the above provision, has in terms held the school commissioner's deed to be such a "grant" as is contemplated by the second clause of section 3 of Article XIII of the Constitution, which provides that one claiming title by "grant from the State" and paying taxes for five years after 1865 or the date of the grant shall, even *without possession*, take the forfeited title, i. e.—

> "One purchasing land sold as forfeited, in a proceeding under chapter 105 of the Code of 1899, holds a *grant from the State* within the meaning of section 3, Article XIII, of the Constitution, so far as to take under that section *the benefit of another forfeited title.*"

*State vs. Jackson*, 56 W. Va., 571.

If, as the plaintiffs contend, the *purchase* from the commissioner of school lands by a *stranger* to the title operates

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to redeem (?) the forfeited title and revest it in the delinquent former owner, what intent can be attributed to the framers of that instrument?— by the very terms of which the "claimant" who may take is the one whose title was at its inception *inferior* to the title forfeited, and such as would, at the time the latter is passed over, *still* be inferior but for the instant merger of the *better* title with it perforce of this provision.

Further; the same section accords the right to the *"claimant" "in possession"* and *"paying taxes."* No limitation or restriction is placed upon the *character* of the claim, from which the "party in default, his heirs and devisees" (but not his *grantees*) are debarred; nor any more, upon the character of the "claim" that may take the forfeited title. The "claim" in neither case need even be based upon a writing; it is *presupposed* to be a *bad one*, one in need of mending, or bolstering. If the "better" title only could take, why not then, instead of *passing* the "forfeited title" (the worse one) to the claimant, *simply have it wiped out?* Why give a man a stone?

Nor is this benefit, under the constitutional provision limited to a *stranger* to the title forfeited; even the *vendee* of the *delinquent* is accorded its full benefit.

*State vs. Collins,* 48 W. Va., 64.

Only three classes of claimants are barred; the "delinquent *himself,*" his *"heirs,"* and his *"devisees."* In the case above the exceptions are strictly limited; on the principle of *expressio unius exclusio alterius.*

Further; whatever of irregularities existed in the said proceeding, have been cured by section 19 of chapter 105 of the Code, as re-enacted by the acts of 1905 and approved by this Court in *King vs. State,* decided in January, 1910, wherein it is provided in part as follows:

> "Whatever right, title, interest and estate the State of West Virginia had to any lands at the date of the sale or conveyance thereof, or instrument pur-

porting to convey the same heretofore made by said State through and by the commissioner of school lands of any county, under an order or decree of the Circuit Court in any suit or proceeding under said chapter one hundred and five of the Code, however derived or claimed, shall be deemed and held to have passed to and vested in the grantee thereof, whether the land so sold was proceeded against *as forfeited, escheated, or as waste and unappropriated land, notwithstanding any irregularity or error in such proceeding or informality* in any such *sale* or *conveyance* or *purported conveyance*, or *want of jurisdiction* in the Court to decree such sale. And *all such sales* and *conveyances* and *purported* conveyances *are hereby confirmed* and *made good and valid.*"

The title claimed by the plaintiffs, was forfeited prior to the institution of the proceeding by H. C. Auville in the year 1882. The title at that time was *absolutely* vested in the State of West Virginia. The State has chosen to waive any irregularity, if any, that may have existed in the proceeding instituted by Auville. Since the State elects to stand by its contracts and confirm its deeds, no one else has right to complain.

Since the *defendants* have not allowed their title to be forfeited since the dates of their deeds — of said "grants"— and have paid more than five years (in fact twenty-eight years) taxes thereon, they are also in position to take the benefit, under section 3 of Article XIII of the Constitution, of any forfeiture of the plaintiffs' title that *may have occurred since.* As said in *State vs. Jackson,* 56 W. Va., 575:

"Therefore, Lansburg had such grant as enabled him to take title under the Jackson-Harrison grant, by virtue of the Constitution, Article XIII, section 3. That section provided for giving the State's title to three classes of persons, the second class being persons *claiming under a grant from the State and paying taxes for five successive years after 1865.* When Landsburg redeemed he paid taxes for more than five years. This would give him the *Jackson-Harrison* title, which was *then* forfeited. And, by payment

*afterwards*, Lansburg would get that title, *if afterward forfeited*. Being a *purchaser* he would get *all* the State's title *by forfeiture* or *otherwise*, by the Constitution and by section 12, chapter 105 of the Code, as found in chapter 95, Acts 1882, Code of 1887, in force at the time of Lansburg's redemption, and as that section still is. Thus, *Lansburg* got the *Jackson-Harrison* title both by statute and Constitution, under that decree."

Thus it is seen, that not only was the plaintiffs' title *divested* by the forfeiture and transferred to the State, all that was necessary to defeat this action, but further, that in fact, the title so divested, was, in the school commissioner's proceedings, sold and transferred to the defendants' grantors, and conveyed by proper deeds, of themselves sufficient to pass the State's title, but, if questioned, confirmed by the act of 1905; and further, even without the act, and though the proceedings should be held defective, nevertheless being "color of title" the defendants were in position to, and did, take the title from the State under section 3 of Article XIII of the Constitution, being in each and every one of the positions requisite, having been in possession for fourteen years and paying the taxes for twenty-eight years; and further, holding title by "grant" (the school commissioner's deeds) from the State, and paying the taxes for more than the required five years since the date of these grants.

In this connection be it further said, in answer to the query of the plaintiffs as to what would be the effect of construing section 23, chapter 29, as "amended" in 1904 by the decision of *Stockton vs. Craig*, that even if such should be the holding of this Court, and plaintiffs' construction of the *Burkhardt* case should be taken to be the law *until* such amendment, *still* their title is *forfeited*, because, more than five years have elapsed *since the supposed amendment*, and under *State vs. Jackson*, 56 W. Va., *State vs. Harmon*, 57 W. Va., and *State vs. King*, 64 W. Va., approved by this Court in *King vs. State*, decided January, 1910, it is expressly held; that the right

in favor of the claimant to take title *continues* to run until *subsequent sale by the State* or *redemption*, neither of which has occurred, and from 1904 the date of the Stockton decision, to 1910, it is in excess of five years, wherefore on plaintiffs' assumption that section 23, chapter 29 excused non-entry until amended to the contrary by the *Stockton case*, nevertheless, under the admission that it did not excuse *thereafter*, it at once, and then, became the duty of the plaintiffs to enter the land, and the *failure since* to do so has of itself resulted in forfeiture; and it is no answer to this to say, that the five years from 1904 had not run *at the date of the trial*, for if, pending the appeal, the plaintiffs' title ends the right to further prosecute the appeal ends with it. The case stands on all fours with one in which the plaintiff in ejectment is a tenant for years and his term expires *pendente lite*, or where a life tenant, plaintiff, dies before the case is decided, or before reversal on appeal. This Court does not try *moot* questions.

Of the continued running of the right in the claimant to take title until sale or redemption so held in the cases cited, this Court, speaking through Mr. Justice *Holmes*, in *King vs. State*, says:

> "It is not surprising that it is held that the right (of redemption) may be lost by transfer *pending the proceedings.*"

But whether the right of redemption be lost or not, having never been *exercised*, the title is outstanding; and, whether "transferred" or not, being outstanding, is *not in the plaintiffs*, wherefore they can have no recovery.

## MARRIED WOMEN.

It is further urged by the plaintiffs, to defeat the forfeiture, that section 6 of Article XIII, in granting a *married woman* the right *within twenty years* to *set aside* the forfeiture

at any time within that period by causing it to be entered, and paying the back taxes, in effect *excepted* her title from its operation — *prevented* a "forfeiture" — in fact, *preserved* her title from forfeiture indefinitely; making the prescription of "twenty years" but a farce, no limitation at all, a mere idle "insertion" without meaning or effect — the *whole provision* idle, for want of a "subject-matter" upon which to operate. How could a "forfeiture" which had *never occurred* be *set aside* or lands "never forfeited" be *redeemed?*

This land, was *first* omitted from the land books for the years 1860, 1861, 1862, 1863 and 1864, five consecutive years, and no attempt toward redemption is pretended. The *forfeiture was complete* in 1870, on the expiration of one year next after the act of 1869, but *subject* (inasmuch as Mrs. Fay was a married woman) to be "set aside," *upon condition;* that is to say, upon condition that she would, within *twenty years* next after, have the land charged to her and pay the taxes and *"thereby* redeem" the land, *not otherwise.* This was not an "open" matter, *liable* to result in forfeiture; but, instead, was *itself* a then *forfeiture* subject to defeasance upon the *exercise* of a right within a permitted time; it was a forfeiture complete and effectual *until,* if ever, the redemption was made; *until then,* the *title remained in the State or its* transferee. *This right* was *never* in this case exercised; wherefore, even if the twenty years had *not* run, nevertheless the *title was divested* and is still outstanding; the *sine qua non* for its restoration, the thing necessary to put the plaintiffs in condition to sue — the "redemption" — has not been made. To read the clause relied on, is to refute the pretention. The Court's attention is asked to the italics, which are ours:

> "And any owner of land *so forfeited,* etc., who shall then be an infant, *married woman* or insane person, *may* until three years after the removal of the disability *have the land* or such interest *charged on such books* with all State and other taxes (chargeable since 1863 and 10% interest), and *pay all taxes and interest thereon for all such years* and *thereby* RE-

DEEM the land or interest therein; provided such right to redeem the land, shall in *no case* extend beyond twenty years from the *time said land was* FORFEITED."

As heretofore shown, the "forfeiting clause" made *no exception.* There was no "saving" *from* the forfeiture, but instead, and, only, a right *upon condition,* in those under disability, to come out *from under* the forfeiture. Until *performance* of the condition, the land stood in all respects like that of a *feme sole* — no worse, no better. The *condition* in this case has not been performed. Aside from the forfeiture under the act of 1869 which contained no saving, if but *five* years had gone by she would have nevertheless, in the absence of redemption, been without standing in Court. But *more* than *twenty years* have elapsed, more than *twice* twenty years. The forfeiture accrued in 1870; twenty years thereafter expired in 1890; twenty more have since expired, and she has not *yet* caused herself to be charged with, nor paid, any taxes on said lands, or even asked permission to do either. The day of grace has elapsed, and the right is long since at an end. The distinction here urged, is best illustrated by the application of a similar principle in *Yokum vs. Fickley,* 37 W. Va., 762:

> "The forfeiture of such lands as become forfeited by omission, called 'omitted lands,' became complete on the 1st day of November, 1836, and the subsequent acts treated them as forfeited, and, although *further time* to *redeem* was given, the *forfeitures* which had accrued by prior laws were not released except in such cases as the owner *availed* himself *of the privilege* to redeem."

But if for any cause there be in the Court's mind doubt as to a forfeiture for the *first five years* (we see no room for any); nevertheless, this land *again* disappeared from the books in 1870, and has never since reappeared. For this, if not already forfeited, a forfeiture accrued in 1875, and the period

within which the right of redemption might be exercised expired in 1895. This suit was brought in 1901, tried in 1907, and even to this date, 1910, there has been no redemption, or offer of any or proceedings to that end.

Plaintiffs, to evade the plain and explicit terms of the Constitution, while admitting that by its terms, a forfeiture of the married woman's land, like of all other lands, is provided, to be effective at the expiration of the five years, nevertheless insist, that because of the added provision that she may within twenty years "redeem," the title *never left her* — citing as illustration the statute of West Virginia permitting redemption from "tax sales" within one year, they say:

> "It has *never been held* that during that year the State has a complete title to the land and that the former owner's title is *absolutely* void."

It is true it has never been so held, neither has the contrary ever been held. The fact is the proposition is so plain that none of all the bar have ever before deemed the plaintiffs' contention of sufficient merit, to raise it in a Court. The very term "redeem" presupposes a previous divestiture of title. The right to redeem is but an "option" given the delinquent upon the doing of the thing required to re-invest himself with what he lost by his default. Until he *does* the thing, exercises the option, there is no re-vestiture of title; but the provision under consideration, is far more emphatic, than the statute alluded to; the forfeiting clause contains no exceptions, the conclusion extends to married women only a privilege, by paying the taxes and ten per cent. interest, to have their title *returned* to them. If they *never pay* it is *never returned* and in this case for twice twenty years she has not paid nor offered to pay, has not exercised the option so graciously extended to her, does not propose to do so. Nevertheless upon the strength of that option, long since expired, she now claims right to oust the occupant who has paid the taxes during all

those years. Counsel may well say there is no decided case on the subject. There is none. No one has ever before even broached such a suggestion.

## THE FOURTEENTH AMENDMENT.

It is further contended by the plaintiffs, to defeat the forfeiture, that the constitutional provision is of itself unconstitutional, in violation of the fourteenth amendment to the Constitution of the United States, notwithstanding the repeated decisions of this Court to the contrary, i. e.—

> *"The system of West Virginia*, forfeiting to the State lands not placed by the owner on the land books for taxation for five years and selling such lands for the benefit of the school fund with liberty to the owner upon motion to intervene and redeem his lands by paying the taxes and charges, *is not inconsistent with due process of law."*

*King vs. Mullins*, 171 U. S., 404.

And the same effect:

*King vs. Panther Lumber Company*, 171 U. S., 437.
*Swann vs. State*, 188 U. S.
*King vs. State, U. S.*, decided January, 1910.

The plaintiffs, to avoid the above decisions, say that the provisions of section 6 were upheld because "aid by statutes." Is it incumbent on the Court to consider such a proposition; that, the validity of the State Constitution is dependent upon what enactments the *legislature* may see fit to pass on the subject, and especially in light of the fact that this section is *in terms* "self-executing" in so far as it divests and transfers the title? The transfer is perforce of law, without need of legislation or the intervention of a Court or other tribunal or officer. This "self-acting" clause as already shown, has been upheld both by the Supreme Court of the State and by that of the United States. These decisions stand unreversed.

Mr. Justice *Harlan's* allusion to the "day in Court" was not on the question of the validity of the State Constitution, but solely as to the conclusiveness of the Auditor's record as to the forfeiture; in substance, that if, under the jurisprudence of the State, in *any* forum, or proceeding, the delinquent was permitted to test the existence of the facts upon which the forfeiture was claimed, before being deprived of his property, dispossessed of it, then he was "not without a day in Court;" and that the statutes of West Virginia permitting such contest upon trial of any claim so founded (for instance in the school commissioner's proceeding before sale, or in the ejectment afterwards) met fully and satisfied the requirements of "due process of law." The paragraph so relied on did not go to the *validity* of the forfeiture clause, nor to the conclusiveness of the forfeiture if the fact existed, neither to the operation of the provision *ex proprio vigore;* but to the question alone as to whether any *tribunal* had been provided by statute, or otherwise existed, in which the defendant might before being *ousted,* be heard upon the question of the *existence* or *non-existence* of the material facts upon which the forfeiture was predicated. As, under the *statute of limitations,* the "better title" forfeits to the weaker one where the claimant of the latter is permitted to remain in adverse possession for ten consecutive years,—and that too, without "office found;" so in case where the owner neglects to *enter* his lands for *five* years, the title passes to the State. In either case, the *former owner may,* when it is sought to dispossess him or to assert the transfer of the title, put in issue, and have passed on by Court or jury, the *existence* of the *facts* alleged to have produced the result. If there be failure by the claimant in either case to show the existence of the material facts, it is thereupon adjudged, no title in fact passed out of the owner; but, if shown to exist, then in the one case, as in the other, the transfer is sustained, not as of the *date of trial* as in the case of "office found," but as of the expiration of the *ten years* or *five* years as the case may be. In the case at bar, the "facts"

upon which the forfeiture is claimed are *admitted*, fully set forth in the case agreed, i. e., that the land here has *never* been entered under the plaintiffs' title since the issuance of the patent fifty years ago, except for the five years mentioned, and no taxes paid in those.

As the question here involved is one of the utmost importance to every land owner in the State, entering into the titles of hundreds of thousands of acres long considered "settled" under the unambiguous provisions of the Constitution of the State, we may be pardoned for going somewhat into the conditions which led to the adoption of those provisions, and into the history of the "system" referred to by Justice *Harlan*, also a word as to the uniform policy at the bottom of the whole fabric; also we beg leave for the convenience of the Court to quote at some length the statutes pertinent, and their hitherto exposition by the Courts.

## HISTORY OF THE "SYSTEM."

The Commonwealth of Virginia, during the Revolution, with plentitude of land and an empty treasury, with small resources for revenue (for her own lands paid no taxes), in order to provide a "subject" for taxation and further to interpose a barrier of outlying settlements between the plantations on the "tidewater" and the marauding Indians to the west, decided to put her lands on the market, and did so. The price theretofore had been two dollars per acre. But the well-to-do of the east being unwilling to leave their comfortable homes to literally risk their scalps, and the price being prohibitory to the adventurous, brave fellows, who lived by their rifles with incomes limited to the proceeds of their pelts, a broader statesmanship substituted the plan of marketing the State's lands at a nominal price (two cents per acre), yielding up the initial revenue from the larger prices to the annual income from a largely increased subject for taxation, but, penny-wise, adopted methods of sale involving least possible expense to

her. This, like all ultra economies, to an incalculable degree, proved calamitous, with duplicate, triplicate and quadruplicate titles, and boundary disputes without limit. Wherefore, an *absolute necessity* arose for a forfeiting system, with an end in view, of more vital importance to the Commonwealth than any mere matter of revenue — the *settling of her land titles;* the security of her citizens in their homes and protection for those who had opened up the wilderness, tilled the soil and supported the State.

In the beginning, when on revenue bent, a land office was established where whosoever would might buy, to the limit of his means, at two cents per acre, as many acres of the State's lands as he chose, to be located at his pleasure and without supervision, or restriction, except that they be *somewhere* on the public domain. The "entry," was required to be surveyed at the purchaser's own cost, under his own direction, and the "grant" followed, without inquiry as to whether, of the "State's lands," or some other. "West of the Alleghanies" was then a mountain fastness, full of savage beasts "and still more savage men," wherefore, the market still remained slow for want of settlers willing to face the risks in advance of protection, so, at the instance of speculators, the notorious "inclusive grants" were authorized, whereunder blanket surveys of immense areas at minimum cost were during the few years at their authorization spread over the whole southwest country many deep, and by descriptions too indefinite and general to give to the subsequent *bona fide* settler information as to their location. As result, in time, as the home-seekers by degrees pushed out into the wilds with their small "improvements," locating here and there, giving value where none was before, they began to find themselves confronted with the *bete noires* long lain dormant quietly awaiting their coming only to appropriate the results of their labors, and at the ripe moment to gather them in. When the awakening came, it was found that the owners of the "Big Surveys" as a rule had *eluded taxation,* refusing to *pay* when assessed, but more frequently

avoiding *even assessment*, in either case, withholding contribution to the government whose protection they demanded, leaving the whole burden to the actual settler, whose cow or mule was in touch of the tythe-gatherer. As the situation developed, it became more and more manifest how unjust, grossly inequitable, it was, that the law-obeying citizens who had developed the country and given to it its value, who had borne the expense of the government, and responded to its call for service, civil and military, who had hazarded their lives to subdue the wilderness, should be driven from under the gourd vines of their planting and denied the fruit of their own fig trees at the instance of those who had shirked every obligation,. express or implied. Such were the *conditions* which originated the "system."

The "system," so-called, was founded upon the universally accepted principle that every land grant by the State is upon *implied condition* that the grantee takes *subject* to a charge in favor of the State for a just proportion of the cost of maintenance of government; and that his *tenure* is subject to full, prompt and faithful observance of his obligation. The "poll tax" and civil and military service are the measure of the citizen's *personal* obligation. The "property tax" is the incident to *ownership*, to the right of a *continued holding;* its prompt *payment*, the *condition absolute* upon which the patentee received, and accepted the property from the Commonwealth and upon which he, and those under him, may enjoy its use. Upon *breach* of this obligation, the right of the State is instant, to resume its own, at its pleasure.

For full and interesting statement of the conditions and the causes, see Hutchinson on Land Titles, pp. 1 and 2. We may be pardoned brief quotation:

> "The result of this loose, cheap and unguarded system of disposing of public lands was, that in less than twenty years after the adoption of the system nearly all of them were granted; the most part to mere adventurers, in large tracts or bodies, containing

not only thousands, but in many cases hundreds of thousands, of acres in one tract.

Often the grantees were non-residents, and few of them ever saw their lands or expected to improve or use them for purposes other than speculation. The entries and surveys under warrants so cheaply and easily obtained were often made without reference to prior grants, thus creating interlocks, thereby covering land previously granted, so that in many instances the same land was granted to two or more different persons. Some time upon survey actually located, others were laid down by protraction — constructed on paper by the surveyors, without ever going upon the lands, thus creating on paper blocks of surveys containing thousands of acres, none of which were ever surveyed or identified, by any marks or natural monuments.

Thus, while the State was rapidly disposing of her large domain at two cents per acre, it was not obtaining the main object in view — the *settlement of the country* and revenue from the owners of lands.

It was found that the grantees not only failed to settle upon and improve their lands, but in most instances they wholly neglected to pay the taxes due thereon, whereby revenue failed and the *improvement of the territory* was embarrassed and retarded. Non-occupation of the lands and non-residence of the owners made a *resort to the lands themselves* the only fund for delinquent taxes."

With the conditions and the reason such, for the exercise of the right, the General Assembly of Virginia provided first, for a *sale* by the sheriff for *non-payment* of taxes, by a series of acts from 1781 to 1791; when, finding this to fail of the main purpose, it followed with provision for *forfeiture* for the non-payment. This, too, after experience, proved short of the needs, because of the persistent neglect and refusal of many and especially the non-residents to have their lands *entered* for taxation, and in 1810, provision was made for forfeiture for *non-entry*. Of this, Mr. Hutchinson says:

"We have seen that, so far, the policy of the State referred to the subject of lands delinquent for

the *non-payment* of taxes. Another class of cases was now discovered requiring *strong measures.*"

In the preamble of this act (February 5, 1810), it is recited:

> "It being represented to the General Assembly that many persons *omit to enter* their lands on the commissioner's book, and thereby *elude* the payment of any revenue tax thereon," etc.

Wherefore, it was thereupon enacted that lands not "entered" within eighteen months next thereafter should be forfeited. This act was moulded and re-moulded in varying form, and finally for the time being, repealed February 9, 1814.

On April 1, 1831, the policy, and prime purpose, of the system theretofore often alluded to in the several acts, was in plain terms, expressly declared:

> *"And, whereas,* it is known to the General Assembly that in many cases, lands, or parts or parcels of lands (especially such as have been granted and appropriated under the act passed at the May session, in the year 1779, entitled 'An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands,' and the subsequent acts on the same subject), which have heretofore been or may hereafter be returned delinquent for non-payment of taxes, and which have heretofore vested by law in the president and directors of the literary fund, or which by the provisions of this act shall, or may hereafter be, forfeited and vested in the said president and directors, *are held by persons* other than those for whose default they have been or shall be so forfeited, claiming *bona fide,* mediately or immediately, under grants from the Commonwealth; and that the said actual holders and bona fide claimants have *settled* and *improved the lands* so by them held and claimed, and have moreover, *paid all the public taxes thereon due,* and charged or justly charged to them; *and it is therefore reasonable and just that the titles of such actual* holders and *bona fide* claimants *should be quieted and perfected,* so far as the

transfer to them of the rights vested in the said president and directors and therefore subject to the disposition of the General Assembly, *can accomplish* that object; Be it, *therefore*, further enacted," etc.

The act of February 27, 1835, restored the provision for forfeiture for non-entry, prefacing the enacting clause with recital of the occasion for it:

> "*And, whereas*, it is known to the general assembly that many large tracts of land lying west of the Alleghany mountains which were granted by the Commonwealth before the first day of April, 1831, *never were, or have not been for many years last past*, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the *non-payment* of taxes has occurred, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands and the *settlement and improvement* of the country is delayed and *embarrassed; for remedy whereof,*
>
> *Be it further enacted*, That all right, title and interest which may hereafter be vested in the Commonwealth by virtue of the provisions of the section of this act next preceding herein, *shall be transferred* to and *absolutely vested* in *any* and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands, or any part or parcel of them, for so much thereof as such person or persons have just title or *claim* to, legal or equitable, *bona fide* claimed, held or derived from or under any grant of the Commonwealth, bearing date previous to the first day of April, 1831, *who shall have discharged all* taxes duly assessed and charged against *him, her* or *them*, upon such lands," etc.

Next followed the acts of 1837, 1841, 1842, 1844 and 1846, reiterating the above, and whereunder the State disposed, by sale, of those of the lands so acquired not by operation of law transferred to junior *bona fide* claimants; and, in emphasis of the *absoluteness* of the transfer of title by such forfeiture, the General Assembly by act (1838) vested *directly* in *Peter Dumas the* "Swann" title to over 2,200,000 acres of forfeited

lands not by way of release to the "former owner," but by *"transfer to"* Dumas, theretofore a total stranger to the title.

By the act of April 12, 1852, the forfeiture and vestiture of the title in the adverse claimant was again reiterated; and lands forfeited for non-entry, not so transferred to claimants, were made open to entry, survey and grant, in like manner as if never before granted by the State, and so too, the acts of March 20, 1858, and see Codes 1849 and 1860, chapter 114. Under the above act of 1852, the *plaintiffs* in this case, appropriated the forfeited "Pickett title;" availing themselves of his failure to "enter," as they had a right to do,— the same right later acquired by the defendants herein as to the plaintiffs' title, because of *their* default. By this latter act, express provision was made whereby the claimant might, should he desire an adjudication, file his petition in the Circuit Court and have his right determined, and so absolute was considered the *forfeiture* that, while the prosecuting attorney and auditor were required to be parties, the *former owners* were not, though required to be named in the *petition* so far as known.

The foregoing statutes were often under consideration by the Courts of Appeals of Virginia, and of this State, and have always been sustained; and the forfeiture, held to be *absolute* and *complete* upon failure to enter the land and pay the taxes due and damages accrued. No *inquisition* or *judicial proceeding* or finding of *any kind* was required to consummate the forfeiture.

*Staats vs. Board*, 10 Grat., 400;
*Hall vs. Branscum*, 10 Grat., 418;
*Wild's Lessee vs. Serpell*, 10 Grat., 405;
*Smith vs. Chapman*, 10 Grat., 469;
*Levasser vs. Washburn*, 11 Grat., 572;
*Atkins vs. Lewis*, 14 Grat., 30.

Also, by the Supreme Court of the United States, approving the foregoing cases, i. e.—

"Forfeiture in such a case *became absolute* and *complete* by the failure to enter and pay the taxes

on the land and the damages in the manner therein prescribed, and no *inquisition* or *judicial proceeding* or *inquest* or *finding* of any *kind* was *required to consummate such a forfeiture.*"

*Armstrong vs. Merrill*, 14 Wall., 120;
*Harvey vs. Tyler*, 2 Wall., 328.

And since the Constitution of 1872 this provision has been upheld by the State Court:

*Holley vs. Howell*, 36 W. Va., 489.
*Yokum vs. Fickley*, 37 W. Va., 762.
*Wiatt vs. Hays*, 38 W. Va., 681.
*State vs. Cheney*, 45 W. Va., 478.
*State vs. Swann*, 46 W. Va., 128.
*State vs. Jackson*, 56 W. Va., 465.
*State vs. Harman*, 57 W. Va., 447.
*State vs. King*, 63 S. E. R., 468.

By the United States Court:

*King vs. Mullins*, 171 U. S., 404.
*King vs. Panther Lumber Company*, 171 U. S., 437.
*Swann vs. State*, 188 U. S., 739.
*King vs. State*, U. S. Sup. Ct., decided January, 1910.

The evils so sought to be remedied were peculiarly rank *west of the Alleghanies*, and, as the omitted speculative surveys were in large degree held by the wealthy in the east, and the occupants (those needing protection) lived west of the mountains, the stronger east later withdrew the protection of these beneficent acts; part of the tyrannous treatment which ultimately resulted in the division of the State.

## WEST VIRGINIA.

So soon as West Virginia became a State, the people, mindful of this, as well as of other grievances suffered at the hands of a General Assembly dominated by hostile interests, in their first constitution, first abolished the "land office" and

its attendant evils, then adopted drastic measures for the *future* after due warning given and a day of grace; having first, in token of the "jubilee year," exonerated all lands owing $20.00 and under, and all omitted lands of 1000 acres, or less, and further extended to all others as matter of *favor*, not "right," *five years* for *entry, assessment* and *redemption.* Promptly at the expiration of the five years so allowed, the legislature proceeded to act, (1869, chapter 125, section 7), reviving all the remedial features of the earlier acts, and adding thereto. See Code 1868, chapter 31, section 34, ante p.

> "It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the State taxes thereon, not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, or shall not have, for five successive years, been charged on such books with such taxes on such real estate, the same, and all the title, right and interest of the owner, legal and equitable, thereto, shall, without any proceeding, be absolutely forfeited to and vested in this State; provided, however, that such owner may, within one year after the passage of this act, cause such real estate to be charged with such taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for such years."

> "All the estate, title, right and interest which has vested or shall vest in this State, or become irredeemable under the provisions of this chapter, shall be transferred to and vested in any person (other than those for whose default the same may have been returned delinquent or forfeited, their heirs or devisees), for so much thereof as such person may have title or claim to," etc.

> "All the real estate forfeited as aforesaid, and not so transferred and vested, shall be sold for the benefit of the school fund."

It will be seen that by this act not only was no "redemption" provided for, but such in terms was expressly inhibited by the imperative "shall be sold;" and further that, while the former acts were limited to omissions *prior to 1832*, this included all *past* and *future*.

By the act of February 27, 1871, the time of *one year* for redemption was extended to *two years* from the passage of that act, subject to the provision that no such redemption should impair any title transferred by law to any other person under the act of 1869. In 1872 so strongly was the importance of this provision impressed upon the people and so vivid their experience with the legislature of the old State, jogged by the warning contained in the act of 1871, that, to avoid further extensions and tamperings at the instance of influence and importunity the people in even stronger language carried the "forfeiture clause" into the *Constitution* itself, together with the transfer of the forfeited title to the occupant tax-payer; and, in almost identical language with the foregoing. Article XIII, section 6:

> "It *shall* be the *duty of every owner* of land to *have it entered* on the land books of the county in which it, or a part of it, is situated, and to *cause himself* to be charged with the taxes thereon, and *pay the same*. When for *any five successive years* after the year 1869 the owner of any tract of land containing one thousand acres or more, shall *not* have been charged on such books with the State tax on said land, then by *operation hereof*, the land *shall* be forfeited and the title thereto *vested in the State*. And any owner of land *so forfeited*, or of any interest therein at *the time of the forfeiture thereof*, who shall then be an infant, *married woman*, or insane person, may, until the expiration of three years after the removal of such disability, have the land or such interest charged on such books, with all State and other taxes that shall be, and *but for the forfeiture*, would be chargeable on the land or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all

taxes and interest thereon for all such years, and *thereby* redeem the land, or interest therein; *provided* such *right* to *redeem* shall in no case extend beyond *twenty years* from the *time* such land *was forfeited.*"

And, by section 3, of this Article, it was provided that all titles vested in the State by forfeiture should *eo instanti* and by operation of law be

> "and are hereby transferred to and vested in *any person* (other than those for whose default the same may have been forfeited or returned delinquent, their heirs and devisees), for so much thereof as such person has or shall have had actual, continuous possession of *under color* or *claim* of title for *ten years*, and who or those under whom he claims, shall have paid the State taxes thereon for any five years during possession."

or if no such person,

> "then to any person (other, etc.), for so much of said land as such person shall have title or claim to regularly derived, mediately or immediately, from or *under a grant* from the Commonwealth of Virginia or this State, not forfeited, which but for the title forfeited would be valid, and who, etc., has paid all State taxes, etc., for five years since 1865, or the date of said grant," etc.

or if there be none of either of the above classes,

> "then to *any* person who shall have had *claim* to and actual, continuous *possession* for any *five* successive years since 1865, '*under color of title,*' and paid all State taxes charged or chargeable thereon for said period."

The *status of the former owner* under the above has been well defined by the State Court in *Maitland vs. McClure*, 24 W. Va., 581:

> "The title to the land and all the right and in-

terest of the former owner having thus by *his default* and the *operation* of the *law* become *absolutely* vested in the State and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity *deem proper*, without consulting the former owner or any one else. For after the *former owner* has *no more claim* to or lien upon the land *than one who had never pretended to own it.* In the exercise of this *perfect dominion over her own property* the State saw proper *to transfer* and vest *her title* to so much of said land owned by her in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same and was not in default for the taxes thereon chargeable to him."

"And all the right, title and interest of the former owner having been completely divested, he has not *a particle* of interest in the land, *no more* than if he had *never owned it.*"

And by the Federal Court, in *Reed vs. Dingess*, 8 C. C. A., 397.

"The whole history as well as the express language of this constitutional provision proves that it was the *intention* to bestow upon the former owner whatever part of the *proceeds* of sale might be actually paid or liable to be paid into the State treasury *after* the State had *sold* the land and paid all the taxes, costs, etc., out of the proceeds of the sale; and that it was clearly *not* intended to give him *any interest* in the *land*, or its proceeds until a surplus should be ascertained by the proceedings conducted alone by the State through her officers. 'Beggars must not be choosers' is a just maxim, and *therefore it is the duty of the Courts to see that the bounty of the State is not used to her detriment by giving to this provision of her Constitution a forced construction and one that could never have been intended.* I am, therefore, of opinion that said fifth section of the Constitution did *not confer* upon the appellant, Maitland, any *claim* or *interest in the land*, or any interest or

right to participate in the proceedings for its sale, his right to the surplus proceeds not arising until after the sale."

"The statute gives the right, by its terms, of redemption, *only after* the State has commenced proceedings for sale of the forfeited land. But there is nothing in it setting a time *within which* the *State must sell*, or requiring it to sell at all. If the State desires to *hold the land permanently* as a State reservation, or park, or for public institutions, *nothing in her legislation* prevents it. It is only if sale is attempted that a *right to redeem is given;* and the State *cannot* be forced to sell."

For the person who may "take"—the claimant under "color" or "claim" to title—see *Core vs. Faupel*, 25 W. Va., 239:

"The principal office of a "claim" or "color of title" is to define the boundaries and fix the extent of the adverse holding. If it is a mere *claim* of title, the adverse holding will be limited to the *actual enclosure* of the claimant. But *if it is a deed or other paper-title*, and the possession is exclusive, it will be regarded as *co-extensive with the boundaries* contained in such deed or paper. The "color of title," however, may be *good* or *bad, legal or equitable.*"

As to the *wisdom* of the "system," see *Wild vs. Serpell*, 10 Grat., 409, quoted with approval in *Maitland vs. McClure*, 24 W. Va., 576.

"In *Wild vs. Serpell, supra*, Judge Lee, in delivering the opinion of the Court, says: 'Considering the peculiar condition of things in that portion of the State lying west of the Alleghany mountains, and the *serious check to population and the improvement of the country* and *the development of its resources* growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and *expedient* as the constitutional power of the legislature to enact them was *clear* and *unquestionable.*' 10 Grat., 409."

Ever since the re-enactment of the above provisions in

1869, and their incorporation in the Constitution of 1872, they have been the target for the vituperation of all tax "eluding" delinquents, yet in every instance upheld by every Court, State and Federal. A further reference to the cases may not be out of place.

For the leading ones, see *ante* page 79-80

The law, as so repeatedly announced by the Supreme Court of the State, is condensed in the following:

> "Acts 1869, chapter 125, and section 6, Article XIII of the State Constitution, forfeiting land for non-entry for taxation, are not repugnant to amendment 14 of the Constitution of the United States."

*State vs. Cheney*, 45 W. Va., 479.

And by the Supreme Court of the United States, as follows:

> "The system of West Virginia of forfeiting to the State lands not placed by the owner on the land books for taxation for five years, and selling such lands for the benefit of the school fund, with liberty for the owner on motion to *intervene* and redeem his lands by paying the taxes and charges, is not inconsistent with due process of law."

*King vs. Mullins*, 171 U. S., 404.

To the same effect:

*King vs. Panther L. Co.*, 171 U. S., 437.
*Swann vs. State*, 188 U. S., 739.
*King vs. State*, U. S., decided in 1910.

The above cases also fully answer the contention of the plaintiffs,— that, against the constitutionality of the *State Constitution*, the claimed conflict with the fourteenth amendment of the Constitution of the United States. This settled, it remains but to *apply* the provision, keeping always in view,

its plain and unambiguous *words*, its *spirit* as deduced from its history, and the *evil* to be met as disclosed by the conditions.

## THE APPLICATION.

Section 6 of Article XIII, of the Constitution of West Virginia has already been set out. Note that by it, it is made, the constitutional *duty* of the *owner*:—

First, *to cause* his lands *"to be entered;"*

Second, "to *cause himself* to be *charged with the taxes thereon;"* and

Third, "to *pay* the same."

Note that the *"duty"* is on the *"owner."* He may not shelter under any neglect of any official. Note also, that the *penalty* for neglect is *inevitable;* a forfeiture *without exceptions;* and, an *inevitable transfer* of the title to the State—*"by operation hereof"*— without intervention of a Court or aid of legislation; and, equally emphatic, the transfer from the State to the taxpaying claimant. The people did not intend to be again trifled with; so, thus closed every avenue by which their wishes might be thwarted.

In the late case of *State vs. King*, decided by the West Virginia Supreme Court of Appeals in December, 1908, and since on writ of error approved by this Court, Judge Brannon, in a very exhaustive and elaborate opinion concerning the delinquent land and forfeiture laws says as to their validity, as measured by the 14th Amendment:

> "Sometime after writing the above opinion I concluded to add some authorities touching the validity of our forfeiture laws as regards the fourteenth amendment, thinking that they may be of some service for reference. In *State vs. Sponaugle*, 45 W. Va., 415, 32 S. E., 283, 43 L. R. A., 727, it is said whether a given action is due process depends upon the nature of the subject; that what would be due process in one instance would not be in another. In this instance

we deal with that great power in which the State is vested with power so wide, the power of taxation. Then, we remark on authority of *Wetherspoon vs. Duncan*, 4 Wall., 210, 18 L. Ed., 339, 'The States have, as a general rule, the right of determining the manner of levying and collecting taxes on private property.' We must not forget this. There we said that processes of collection or enforcement of taxes long used, as in the two Virginias, by forfeiture, had always been regarded, before the amendment, as due process. And *Kelley vs. Pittsburg*, 104 U. S., 78, 26 L. Ed., 659, says that systems of taxation established are not affected by the amendment. In the Sponaugle case it is said that due process does not always require judicial proceeding, and that tax collection does not. Reference was made in the Sponaugle case to the case of *Murray vs. Improvement Co.*, 18 How., 272, 15 L. Ed., 373, where a distress warrant issued by an executive officer for a balance due from a collector of customs, under which sale of land was made, was held due process. There was no decree for sale. *McMillan vs. Anderson*, 95 U. S., 37, 24 L. Ed., 335, says that such is not necessary to collect taxes. Is the manner of enforcement of payment the established, usual mode of the State? If so, it is due process under the amendment. *Hurtado vs. California*, 110 U. S., 537, 4 Sup. Ct., 111, 28 L. Ed., 232. What was due process before the amendment still is under it. *Slaughter House cases*, 16 Wall., 78, 21 L. Ed., 394. Since *King vs. Mullins*, 171 U. S., 404, 18 Sup. Ct., 925, 43 L. Ed., 214, held our forfeiture laws not repugnant to the Federal Constitution, the case of *State vs. Swann*, 46 W. Va., 128, 33 S. E., 89, again sustained there, and on appeal to the United States Supreme Court that Court again held likewise, following the Mullins case. *Swann vs. State*, 188 U. S., 739. In *United States vs. Repenteguy*, 5 Wall., 212, was a grant to be forfeited for failure to improve. It was held that forfeiture vested title in the government, and that under 'our system of legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or assuming the forfeited grant is subject to legislative authority.' Page 268 of 5 Wall. It was held that forfeiture vested title in the government without judicial declaration of forfeiture. In *McMicken vs. United States*, 97 U. S., 217, the Supreme Court said: 'This

Court has in several cases maintained the doctrine that an actual entry or office found is not necessary to enable the government to take advantage of a condition broken and to resume the possession of land which has become forfeited.' It was so held in *United States vs. Repenteguy's Heirs*, 5 Wall., 211; *Schulenberg vs. Harriman*, 21 Wall., 44, and *Farnsworth vs. Minnesota and Pacific Railroad Co.*, 92 U. S., 49. In *Repenteguy's Case*, the Court says: 'The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.' In *Farnsworth vs. Min. & Pac. R. R. Co., supra*, it was held that, if a grant to a railroad company on condition of construction should be forfeited, the forfeiture may be declared by legislative act, without judicial proceeding. So, by these decisions, and the decisions of our courts, upon our forfeiture laws, title at once vests in the State, and the right to actual possession would follow. The State has title and constructive possession incident to title."

"In *Fairfax Devisees vs. Hunter*, 7 Cranch, 622, Justice Story said: 'As to the first point, we will not say it was not competent for the legislature, by special act, to have vested the land in the Commonwealth without an inquest of office for the cause of alienage.' And I think the case of *Soper vs. Lawrence*, 201 U. S., 359, will sustain our forfeiture laws against the charge that they are void under the fourteenth amendment. A statute of Maine authorized the treasurer to convey wild land, taxed and delinquent, and provided that payment of taxes and possession for twenty years under such deed should bar the former owner's right of action, which was held consistent with that amendment. The title sustained arose from forfeiture. The Circuit Court of Appeals, Chief Justice Fuller, present, expressed the decided opinion that our forfeiture laws are valid. *Reed vs. Dingess*, 60 Fed., 21, 8 C. C. A., 389. In *Smith vs. Maryland*, 6 Cranch, 286, it was held that an act confiscating land is good without office found. In Louisiana is a statute forfeiting land for delinquency. It was held not contrary to the fourteenth amendment. *Morrison vs. Larken*, 26 La. Ann., 699. See *Owen vs. Owen*, 25 S. C., 155. Such laws are stated to be

constitutional in 27 Am. & Eng. Enc. L., 847. In 8 Am. & Eng. Enc. (1st Ed.), 451, it is laid down that forfeiture may take place by legislative acts, without office found, and that the common law rule of office found does not apply. *Kinney vs. Beverly*, 2 Hen. & M. (Va.), 317 so holds. Again, these forfeitures are by the Constitution and statute, not by common law. 'When forfeiture accrues at common law nothing vests in the government until some legal step shall be taken for the assertion of the rights, and then for many purposes the doctrine of relation vests the title as of the time of the commission of the offense. If, however, a forfeiture is provided for by the statute, it is said that the rule of the common law does not apply, and the thing forfeited may vest either immediately or on performance of some particular act, as shall be the will of the legislature. If the forfeiture is declared by the statute in absolute terms, not in the alternative, it is held by the great weight of authority that the forfeiture takes place at the time the prohibited act is committed and the owner is divested of title *eo instante;* the forfeiture operates as a statutory transfer of title to the government,' 19 Cyc., 1362. We have the high authority of Chief Justice Marshall in *United States vs. Grundy*, 3 Cranch, he saying: 'When a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately or on performance of some particular act, as may be the will of the legislature.' For this proposition I cite the well considered case of *Oakland R. Co. vs. Oakland B., etc., R. Co.*, 45 Cal., 365, 13 Am. Rep., 181. Desty on Taxation, 702, states that: 'There may be a forfeiture without office found if the legislative intent be clear. The common law principle does not apply to taxation. It has been held in some States that a forfeiture cannot be perfected so as to divest the title of the owner without inquest of office; but, otherwise in other States.' That means that no inquest of office finding forfeiture need be to vest the State with title. Our own cases explicitly say so.

If it be said that some of these cases were before the amendment, I reply that I cite them to show that the procedure was the usual one, consistent with the law of the land, and being due process before, so it is since, the amendment. The amendment does not define due process. What was such before it came, is since.

*Barbier vs. Connally*, 113 U. S., 27. Forfeiture laws prevailed in Virginia long and have prevailed in this State long. Titles covering counties rest on them and their overthrow at this late day would spread disaster wide."

Justice Harlan, in *King vs. Mullins*, says:

> "The plaintiff was entitled to recover only on the strength of his own title, whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain his action of ejectment. If it appears that the title has been forfeited to the Commonwealth for the nonpayment of taxes, or other causes, and there is no evidence that it has been redeemed by the owner or resold, or regranted by the Commonwealth, the presumption is that the title is still outstanding in the Commonwealth."

## KING VS. MULLINS.

Plaintiffs' attempted distinctions.

The plaintiffs seek to draw a distinction between the case at bar and the Mullins case and thus to take theirs out from under the case of *King vs. Mullins* and the three others in this Court approving and following it. They concede that under that case, the Constitution, so far as divesting the former owner and transferring his title to the State and thence to the party entitled to take, operates *proprio vigore*, the Court so there held that, the *effect* of the State Constitution under the only construction it would bear, was that and nothing else; wherefore, the question considered and decided in the *Mullins* case was not as to the "intent" and "effect" but as to the *validity* of the provision. Its "validity" was upheld,— it is now as it was then. If not violative of the Fourteenth Amendment then, it cannot be now. This Court, in the *Mullins case*, never for a moment questioned the *right* of the people of the State in their Constitution or by statute to make the tenure of lands dependent on payment of taxes (itself an implied reservation in every grant by sovereignty), nor did it

question the right to make the breach of this condition, of itself, to effect the divestiture. The only question was whether sovereignty could *enforce* the right by forcible dispossession without a time and place where the claimant could contest the *existence of the facts* upon which the right was founded. Neither did this Court in the Mullins case pretend to say, that *until* such contest the title *remained in the claimant,* the delinquent, *subject* to a later divestiture by such determination. On the contrary, in that case it was expressly held that the Constitution did *eo instanti* transfer the title; and, in that case no judicial determination of the facts constituting the forfeiture had in fact been had, nor was the question ever raised, until the trial of the cause,— an ejectment. Nevertheless, the facts being *on that trial* shown to have existed prior to the bringing of the suit, the title was held to be *outstanding,* and the plaintiff could not recover.

Here, in the case at bar, like in that of Mullins, the Constitution *eo instanti* upon the accruing of the forfeiture, divested the plaintiffs of title, before the bringing of this suit. The *facts* were shown at the trial. No revestiture by redemption was claimed. The *status in quo* was admitted. The lower Court held as this Court held in the Mullins case, that without any "office found" or other judicial proceeding, the title was then *outstanding,* and that upon the case on the "facts" the title as it stood, must fall.

King, in his case, thereupon sought to re-acquire the title by subsequent redemption, in order that he might bring a new suit on the re-acquired title. It was in that proceeding, (*State vs. King*), shown, that after the ejectment, parties under inferior titles — some by school land deeds (grants from the State), others by five years' possession and payment of taxes, perforce the self-executing clause of the Constitution and without judicial proceedings, some perforce of the legislative grant in the act of 1905, validating void school land deeds,— had intermediately acquired whatever of title had vested by the forfeiture in the State. Wherefore King's former

title, forfeited and sought to be redeemed, had passed out of the State and was no longer *subject to redemption.* The State Circuit Court so held; the Supreme Court of Appeals affirmed it; and this Court at this term approving it, dismissed King's writ of error; see *King vs. State,* decided January, 1910, in which this Court concurred with the State Court, in holding that the Constitution was self-acting, divesting the delinquent at the instant the forfeiture accrued; that the title thus vested in the State was at her disposal subject to be passed without judicial proceeding, by operation of the Constitution alone, to the younger tax-paying claimant, or by legislative grant; and, that the "right of redemption" was but of grace and favor, dependent upon its exercise, *before* other disposition of the lands by the State; and further, that such other disposition of the lands was *not* dependent upon the *former owner's* consent, or on proceedings in Court to which he was party, or on any proceedings whatever; and still further, that the running of the five years in favor of adverse claimant, continued, even after a petition filed for redemption, and up to the date of actual redemption made. The State Court so held, and this Court, on consideration of it, says:

> "Then as now, it was obvious that the right to redeem under the statute *would not exist in case part of the land had been sold to a junior purchaser,* so that in that case there would not be a 'revestiture commensurate with the divestiture' as it is argued that there should be, and to say the least, it is not surprising that it, (The State Court), held that the right might be lost pending the proceeding. The *whole discussion* on this point is little more than an attempt in respectful form, to reargue *by unreal distinctions,* what was decided in the former case."

The fallacy of the plaintiffs' contention is, in ignoring the distinction between the "right" and the "remedy." As, one having title by proper deed, may not forcibly take from the adverse claimant lands in possession, but must have his right established before execution issues — before receiving the

aid of the law in the assertion of the right, so must the claimant give the former owner his day in Court, an opportunity, if he desires it, to resist the claim before being dispossessed. The *right* accrues perforce of the existence of the *facts* upon which the forfeiture is predicated, the *enforcement* of the right the "remedy," depends on the judgment of the Court. The "day in Court," "the due process of law," has only to do with the latter; and when the adjudication of the right is had, it speaks as of the time when the right accrued. In the ordinary ejectment, the plaintiffs' title is in issue, and the defendant then and there has his day in Court to contest it, and when established it speaks as of its date, anterior to institution of the suit and governs the judgment; or if the defendant reply on adverse possession, the plaintiff then and there contests the facts relied on to constitute it, he has his day in Court and if found for the defendant, the determination speaks as of the expiration of the statutory period, anterior to the suit, and the judgment goes accordingly. No preliminary or prior *hearing* or procedure is required. Due process of law has been had in either case, so here.

The "right" attached upon the event constituting the forfeiture. The Constitution operated at once upon those facts to divest the delinquent's title. If the requisite "facts" *did not exist* the Constitution did not operate. The time and place to *test* the facts are in the proceeding wherein the *right is asserted*, the *forfeiture set up;* and if leave be given to the former owner to make contest there, this satisfies the Fourteenth Amendment.

Had the Constitution provided that the auditor's certificate of forfeiture, or any other non-judicial *decree*, should be *conclusive* upon the former owner, shut him off from disputing the existence of the facts upon which the forfeiture was claimed, then what the plaintiffs here urge as to the Fourteenth Amendment, and about being denied "due process of law," would be pertinent, but not when, as in the King case, and as here, the Court was open to them to present all facts re-

lating to the alleged forfeiture and did receive and consider them, and, was open to, and did, pass on the existence and sufficiency of them. The only real question before this Court in this case is, not the *validity* of the State Constitution, that has been settled four times by this Court, but; whether the *facts* admitted by the plaintiffs in the agreed statement, *brought the case within its operation;* a question for the Circuit Court of Appeals, if there be room for question, and not addressed to this Court.

In further attempt to distinguish from the *Mullins case,* plaintiffs say: that because of the State's sale in 1882, she barred herself of a further proceeding, wherein and wherein only, the plaintiffs might have redeemed, *hence* the Constitution is invalid! The earlier statutes follow those of Virginia, provided a proceeding for sale of State land, purely administrative in their nature, a sale by a commissioner, under order of the Court, in a proceeding *without party*—a simple disposition of the State's property, not dissimilar to sales by sheriff for non-payment of taxes. The purchaser took the State's title without warranty; the owner, or former owner, had his day in Court when the purchaser would assert his rights. These, were the proceedings under consideration in *Wild vs. Serpell,* 10 Gratt., *Armstrong vs. Merrill,* 14 Wall., and in *Maitland vs. McClure,* 24 W. Va., in which last case all previous cases were collated, reviewed and approved. Such continued to be the statute (The Constitution creating the forfeiture remained the same), until 1882, when in order to provide a judgment in first instance, thereafter conclusive on the former owner, it was directed that "all claimants and their residences, *so far as known,* should be named in the petition for sale and notice be given them in order that they might as parties, be bound by the decree, but only those so made parties were to be bound, it being expressly provided, as to the *effect,* of the sale and deed, that the purchaser should take only,

"The right, title and interest *of the State of West*

> *Virginia* in and to the real estate thereby conveyed, which passed to, and *vested in*, the *State* under the Constitution and laws thereof by reason of the forfeiture of such real estate, or otherwise."

***As to 'waste and unappropriated lands,' the law was left as before.***

The plaintiffs' patent having been issued by Virginia before formation of West Virginia, the commissioner of school lands of McDowell County, ignorant of its existence, proceeded against the land as "waste and unappropriated," sold it, and under a decree of the Court conveyed it to those under whom the defendants claim. By both the terms of the act and all cases construing it, a sale for *any cause* by the State under either proceeding vested in the purchaser *all* the *State's title* however acquired or held, whether by forfeiture or because the land was waste and unappropriated, or *otherwise.*

The proceeding, being by State and the sale being by her, passed all her estate however held to the purchaser. It was immaterial whether under forfeiture for Mrs. Fay's default, or because it was waste and unappropriated as the commissioner supposed, the purchaser, in either event, by these deeds was put in the State's shoes only differing in position from a purchaser under a proceeding to which the former owner was party, in that in the latter case the former owner would have been *estopped* by the decree to dispute the forfeiture, while in the former, he was not;— as was conceded by the defendants here, and as was held by the lower Court, *Mrs. Fay* was not; wherefore, she had right to and was, accorded in the ejectment, this suit, privilege to contest the facts upon which the forfeiture depended.

The case at bar, stood, as it would, had the sale been under the previous act, which provided for no "parties" to the proceeding. The former owners here were not *"known;"* and the jurisdiction to proceed, was in no sense dependent on their presence. The State disposed of *her* interest to the purchaser, and he got it; but, were it open to doubt, the act of 1905, upheld as shown, confirmed it; wherefore then discuss the

question as to whether the sale was "void" or not. Even the plaintiffs, after repeated assertion that it was "absolutely *null and void,*" (brief, top of page 39), on page 51, the last line, coupled with the reiteration the following qualifications, *"though its validity cannot be disputed by the statute."* This in order that they may say, that because the State had thus disposed of her title, she had thereby barred herself of further proceedings, and by reason thereof (not of the Constitution or statute), Mrs. Fay lost her right to redeem — Wherefore! the Constitution and statute are in conflict with the fourteenth amendment!!! We submit the statement of the position is its own reputation, even if their assumption as to the effect of the proceeding were correct; but, it is not correct.

By section 6 of Article XIII of the Constitution, as shown, the forfeiture operates upon titles of *all* delinquent land owners, those under disability as well as those not, but with a privilege, option, to the former owner, in this case, the married woman, to take her lands out of the category by certain payments within twenty years. It could not be foreseen whether she would exercise the option or not, and was so recognized; it was never contemplated, that the lands should stand in abeyance for twenty years, untaxed, awaiting her decision, wherefore there was no exception in the direction to sell *all* forfeited lands;— those of the married woman along with the rest — but only the "State's interest" therein,— in her case the *full title,* subject only to a right of defeasance in her, a privilege of *re-acquiring* the title within the period of the option, by a payment of the back taxes, with ten per cent. interest. This is the title and estate the State sold in 1882 and the purchaser took it, *cum onere,* subject to the option which Mrs. Fay had at any time within the date of forfeiture, to tender to the vendee of the State the taxes and interest and thereupon compel a deed. She did *not* redeem or offer to redeem. The twenty years have run, and this statute of limitations has attached and barred her right;

but whether *barred* or not, certainly *until she does so pay*, the title is *outstanding*.

The plaintiffs, again, to escape, seek to distinguish between a "forfeiture" and a "complete" forfeiture, citing *Bennett vs. Hunter*, 9 Wall., wherein construing a Federal statute it was said that: *that* statute, on the wording of it, did not divest title *until a sale*. The question there as here, was solely one of *construction*, and there, of a Federal statute. The statute differed materially in its language from the one here; and further, was open to the Court, to construe. The statute in the case at bar is a *State statute* already many times construed by the Court of last resort in the State, and that construction approved by this Court; and *settled* in the Mullins case, where, as shown, the Court held the plaintiffs' title *divested*, notwithstanding there had been no sale; and later, in *King vs. State* sustained, though in that case no sale *could be made* because of the intermediate disposition of the title by the State. These cases both by this Court, furnish apt and conclusive answers to the claim. Plaintiffs next ask, *when* did the forfeiture occur!

We answer:

It accrued on the first day of April, 1870, at the expiration of the one year of grace given by the act of 1869, and because of failure within that year to cause the land to be entered and taxes paid for 1860, 1, 2, 3, and 4; and that the one year was a period of limitation and operated *a proprio vigore*.

But if mistaken in this:

Then the forfeiture was complete in 1870, at the expiration of one year next after the purchases by the State in 1869, and the title, by virtue of the statute giving the sale to the State the force of a deed, vested the title in the State and whether that sale was good or voidable, the title is still bad, the *condition of avoidance* being the payment of the back taxes admitted never to have been paid.

But if mistaken in this:

Then, on the first day of January, 1875, at the expiration

of five years next after 1869, because of *non-entry*, of the omission of the lands from the land books for five successive years, a forfeiture by express mandate of both Constitution and statute, one beyond the power of legislature or Courts to relieve from. Not avoided by the act forbidding the entry of the State's lands; because on the plaintiffs' assumption that they were not then "State's land," not forfeited, and the tax sales void, the title of Mrs. Fay not having been divested. On the plaintiffs' assumption, they then were not within the letter or the purview of the act invoked, or if covered by the act, then it itself, was void, as in conflict with an express and self-executing provision of the Constitution. But should we be wrong in all the foregoing propositions, and even should the Court hold that the forfeiture was deferred twenty years from its date — or as plaintiffs put it, twenty years from the expiration of the first five years of omission:

Then, on the first day of January, 1895, six years before this suit was brought; when, even the *right to redeem expired.*

The defendants insist:

That the plaintiffs' title is forfeited for non-entry for each and every five years since the patent date, January 3, 1860, to this date — fifty years — except for 1865-9, for which years it was *sold* to the State for taxes.

That, under the authorities, the title was *abandoned* and reverted to the State, and was hers to dispose of and was disposed of by her for full value to those under whom the defendants claim, who now and for years have owned and improved and paid taxes on the same. See *Reed vs. Dingess*, 8 C. C. A., Judge Brannon in *Stockton vs. Craig*, 56 W. Va.

That the plaintiffs' claim is *barred*, under the statute of limitations, by the fourteen years of adverse possession by the defendant:

First, because of the application of the statute made in *Caperton vs. Gregory*, 11 Grat., 505, already set out.

Second, because the right of action was in the *life tenant* — the husband — as plaintiffs say by the courtesy initiate.

*He* at least, was not under disability, and he, the other one entitled to the present estate, the possessor, being barred, this action must fall.

While unnecessary for the defendant, to do more than show title outstanding, they have done more. They have shown title in themselves,—by the "school land deeds;" by "the transfer" and investiture resulting, under the Constitution, from their possession and payment of taxes, under at the least, "color" and "claim" of title; by the "legislative grant" in the act of 1905 and, by the *"statute of limitations."* They are no interlopers unworthy of consideration, but instead *bona fide* purchasers in actual possession. They have developed the land and given it its value, expended large sums upon it in opening up the mines and making the incident development and improvement.

As against this plaintiffs' equity is an original investment of $24.00, no taxes since, though fifty years have elapsed, an absolute abandonment of all claim and repudiation of all incident duties until tempted by the values added by the defendants; and, now, offering neither to make good to the State the taxes avoided nor to the defendants recompense for those paid by them, of which they modestly claim the benefit or return of their expenditures, there is nothing in the plaintiffs' case calling for a less drastic application of the law than in the old one, involving the pound of flesh.

## IN CONCLUSION.

We ask that discussion of the foregoing question may not be interpreted as lack of confidence in our motion to affirm and dismiss. That motion is confidently relied upon and urged in good faith and without purpose of delay.

Respectfully,

JAMES F. BROWN,
D. J. F. STROTHER,
W. W. HUGHES,

March 14, 1910.

# FAY *v.* CROZER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 165. Argued April 21, 22, 1910.—Decided May 2, 1910.

A writ of error based on constitutional question will not lie unless the controversy is a substantial one and the question open to d[illegible]on.

If the identical question has been determined in a suit involving a state statute it is foreclosed although it may subsequently arise in connection with the provision of the constitution of the State under which the statute was enacted, and the writ of error will be dismissed.

There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseized.

The questions involved in this case having been determined in *King* v. *Mullin*, 171 U. S. 404; *King* v. *West Virginia*, 216 U. S. 92; the writ of error is dismissed.

THE facts are stated in the opinion.

*Mr. George E. Price* for plaintiff in error.

*Mr. J. F. Brown, Mr. W. W. Hughes* and *Mr. D. J. F. Strother* for defendants in error.

PER CURIAM: This is a writ of error to the Circuit Court of the United States for the Southern District of West Virginia, brought directly to this court, and as such falls within the rule that the controversy must be substantial and the question open to discussion. Tested by that rule, we think the writ of error must be dismissed on the authority of *King* v. *Mullins*, 171 U. S. 404; *King* v. *West Virginia*, 216 U. S. 92. And see *King* v. *Panther Lumber Company*, 171 U. S. 437; *Swann* v. *State*, 188 U. S. 739. It is contended that the question of the forfeiture of plaintiffs' title under the constitution of West Virginia was not ruled in those cases, because they also involved the statute of the State referred to, while this case presents the validity of the forfeiture provision of the state constitution alone. But it was pointed out in *King* v. *West Virginia*, 216 U. S. 100, that the right to redeem given by the statute was not coextensive with the forfeiture under the state constitution, and yet the constitution was upheld, as it was in *King* v. *Mullins*, 171 U. S. 404. It follows, therefore, that the state constitution must be upheld in the present case. The only hearing that could be necessary would be whether the facts constitute a forfeiture, and that question when it arises between a former owner and a claimant under the State can be tried in a case between those parties, as it was here. There is no greater objection under the Constitution of the United States to the forfeiture of land for five years' neglect to pay taxes than there is to a similar forfeiture by the statute of limitations for neglect to assert title against one by whom the former owner has been disseised. We think that the question suggested is so plainly covered by the preceding cases that the writ of error must be dismissed.

*It is so ordered.*